A TREATISE

ON

THE LAW OF ESTOPPEL.

A

TREATISE

ON THE

LAW OF ESTOPPEL

AND

ITS APPLICATION IN PRACTICE

BY

MELVILLE M. BIGELOW

PH. D. HARVARD

FIFTH EDITION

BOSTON

LITTLE, BROWN, AND COMPANY

1890

University Press:
John Wilson and Son, Cambridge.

PREFACE

TO THE FIFTH EDITION.

In the present edition the cases are brought down to the time of writing; a chapter on 'Negligence without Representation' (Chapter XIX.) has been written; and considerable additions have been made throughout the book, as in regard to fraud touching judgments, estoppel by misrepresentation, and estoppel by waiver. Some changes in arrangement, by way of better method, have also been made; these, I hope, are final and sufficient.

I have to thank my friend Sir William Anson for giving me free access, early and late, to the library of All Souls College. Much of the work of preparing the edition has been done in the quiet of this retreat of Blackstone and many another worthy.

M. M. B.

All Souls Library, Oxford.

PREFACE

TO THE FOURTH EDITION.

BEYOND the usual working up of the current cases, with the re-examination and rewriting made necessary thereby, the chief features of the present edition consist (1) in a more clear and exact marking of the limits of the subject in various places, and (2) a filling out to the limits wherever there was found vacant territory.

Sometimes vacant places were found where the boundaries of the subject were already sufficiently marked out, as in the chapters on Res Judicata and Judgments; sometimes it was found necessary, as in some of the chapters relating to estoppel in pais, both to fix the metes and bounds and to fill out the ground. A particular example of the latter work may be seen in the new section 7, on Waiver, of the chapter on Estoppel by Conduct, pp. 633–641;[1] one of the former, in the consideration of judgments in rem, in Chapters II., IV., V.

In this way much has been done at once to complete the subject and to distinguish things which, while bearing a resemblance to estoppel, are in reality something else. 'Quod simile non est idem.'

BOSTON, Sept. 1, 1886.

[1] Chapter 20, 5th edition.

PREFACE

TO THE FIRST EDITION.[1]

THAT the law of estoppel should have been looked upon as an unprofitable subject and left until recent times to haphazard growth is nothing strange. There is something forbidding in the very subject; it has been thought to be hard, dry, and technical, and the courts used to call estoppels odious. But this notion is now out of date; and to no one is so much due for dispelling it as to Mr. John William Smith. The spirit with which he approached the subject in his note to the Duchess of Kingston's Case is as admirable as the language is familiar: 'Notwithstanding the unpromising definition of the word "estoppel" [by Lord Coke], it is in no wise unjust or unreasonable, but on the contrary in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. Interest reipublicæ ut sit finis litium; but if matters once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion.'

[1] Abridged and in part rewritten.

Mr. Smith's note, however, with all the additions of later editors, presents only an outline of the law of estoppel; and the subject has expanded to such proportions in recent times that something more has been called for. The present work is an attempt to meet the later demand for a more exhaustive treatment of this venerable branch of the law. The plan adopted by the author for carrying out the undertaking has been somewhat different from that pursued in most other law books, though resembling that of some of the best English books, such as Jarman on Wills. The work consists in its main feature in presenting the law by way of a review of the cases upon a statement of their facts, as in Jarman; to this being often added, by way of support of the text, what historians sometimes call 'pièces justificatives,' — that is to say, the very language of the authorities upon which the text is founded. The reader is thus enabled to judge the better of the correctness of the author's statement of the law.

The 'Institutes' has been written with special reference to the use of students, as an introduction to the work. Not to invoke the greater Roman example, the idea was suggested by the Introduction of Mr. Adams to his Treatise on Equity, one of the most useful features, in the present writer's opinion, of that valuable work. It may be hoped that the practitioner also will find the Institutes of service in making him acquainted with the order of arrangement of the several parts of the subject.

Boston, July 20, 1872.

CONTENTS.

PAGE

CASES CITED xvii

INTRODUCTION.

1. Nature of Estoppel 3
2. Institutes 8

PART I.

RIGHTS ARISING FROM ESTOPPEL BY RECORD.

CHAPTER I.

PRELIMINARY VIEW: THE RECORD 35

CHAPTER II.

PRELIMINARY VIEW: RES JUDICATA 39
§ 1. Meaning and Use of the Term 39
§ 2. Requisites of the Estoppel 51
§ 3. Special Tribunals 61
§ 4. Special Judgments (on the Merits) of the ordinary Tribunals 72

CHAPTER III.

JUDGMENTS IN PERSONAM 80
§ 1. Former Judgment: Identity of Causes of Action 80
§ 2. Former Verdict: Identity of Point in Issue 90
§ 3. The Special Effect and Operation of Judgment and Verdict Estoppels 103
§ 4. Collateral Impeachment of Judgments 202

CHAPTER IV.

JUDGMENTS IN REM 221

CHAPTER V.

PAGE
FOREIGN JUDGMENTS IN REM 236

CHAPTER VI.

FOREIGN JUDGMENTS IN PERSONAM 256
§ 1. Historical View of the Subject 256
§ 2. Constitutional Provision: Judgments of Sister States . . 266
§ 3. Application of Rule of Res Judicata 274
§ 4. Jurisdiction 288
§ 5. Fraud 302
§ 6. Merger 308
§ 7. Judgment for Defendant 313
§ 8. Garnishment or Trustee Process 314
§ 9. Privity 317
§ 10. Judgments of foreign Courts of inferior Jurisdiction . . 319

PART II.

RIGHTS ARISING FROM ESTOPPEL BY DEED.

CHAPTER VII.

PRELIMINARY VIEW: THE SEAL 329

CHAPTER VIII.

PRELIMINARY VIEW: PARTIES AND PRIVIES 334
§ 1. Parties 334
§ 2. Privies 341

CHAPTER IX.

PRELIMINARY VIEW: LIMITATIONS OF THE DOCTRINE 349
§ 1. The Deed must be Valid 349
§ 2. Estoppel limited to Questions directly concerning the Deed . 352
§ 3. Grantee in Deed-Poll: In Indenture: Mutuality 356
§ 4. Estoppel against Estoppel 360
§ 5. No Estoppel if Truth appears 361

CHAPTER X.

PAGE
RECITALS 365
§ 1. Particular Recitals 366
§ 2. General Recitals 377

CHAPTER XI.

TITLE BY ESTOPPEL 384
§ 1. History of the Subject 384
§ 2. Leases: Where no Interest passes 390
§ 3. Leases: Where an Interest passes 391
§ 4. Grantor and Grantee 394
§ 5. Grantee before and Grantee after Title acquired 413
§ 6. Personal Property 446

CHAPTER XII.

RELEASE OF DOWER 448

PART III.

RIGHTS ARISING FROM ESTOPPEL IN PAIS.

CHAPTER XIII.

PRELIMINARY VIEW 453

A. *ESTOPPEL BY CONTRACT.*

CHAPTER XIV.

FACTS AGREED OR ASSUMED 459
§ 1. The general Principle 459
§ 2. Corporations 461

CHAPTER XV.

ACKNOWLEDGMENT OF RECEIPT 471

CHAPTER XVI.

PAGE

COMMERCIAL PAPER 480
§ 1. Genuineness 480
§ 2. Capacity 495
§ 3. Certification of Checks 499
§ 4. Transfer by Indorser after Liability fixed 504

CHAPTER XVII.

LEGAL EFFECT OF CONTRACT: TAKING POSSESSION 506
§ 1. Estoppel of Tenant to deny Landlord's Title 506
§ 2. Estoppel under Contract of Purchase 545
§ 3. Estoppel of Bailor: Receiptor of Goods 548
§ 4. Employees: Assignees and Licensees: Patents 552
§ 5. Possession taken under Will or Intestacy 554

B. *ESTOPPEL BY CONDUCT.*

CHAPTER XVIII.

ESTOPPEL BY MISREPRESENTATION, OR EQUITABLE ESTOPPEL . 556
§ 1. Nature of Estoppel by Misrepresentation 556
§ 2. The Representation 570
§ 3. Knowledge of Facts by Party to be estopped 609
§ 4. Ignorance of Facts by Party claiming Estoppel 626
§ 5. The Intention 628
§ 6. The Representation must be acted upon 638

CHAPTER XIX.

NEGLIGENCE WITHOUT REPRESENTATION 653

CHAPTER XX.

WAIVER 660

C. *QUASI-ESTOPPEL.*

CHAPTER XXI.

ELECTION AND INCONSISTENT POSITIONS 673
§ 1. Election 673
§ 2. Inconsistent Positions generally 683

PART IV.

PROCEDURE.

CHAPTER XXII.

PAGE
PLEADING THE ESTOPPEL 697

CHAPTER XXIII.

ESTOPPEL BY RECORD 701

CHAPTER XXIV.

ESTOPPEL BY DEED 707

CHAPTER XXV.

ESTOPPEL IN PAIS 709

CHAPTER XXVI.

INCONSISTENT POSITIONS IN COURT 717

CHAPTER XXVII.

PRECEDENTS IN PLEADING 724

INDEX 743

CASES CITED.

A.

	Page
Abbott *v.* Allen	357
Abouloff *v.* Oppenheimer	217, 254, 308
Accidental Death Ins. Co. *v.* Mackenzie	510, 532
Achorne *v.* Gomme	515
Acker *v.* Leland	151
Ackley *v.* Dygert	605
Acton *v.* Dooley	570, 618, 620, 621
Adair *v.* New River Co.	136
Adams *v.* Adams	76, 153, 168
v. Barnes	144
v. Brown	628
v. Cameron	100
v. Graves	54, 58
v. Morrison	564
v. Popham	582
v. Rockwell	587, 621
v. Rowe	294
Adams Co. *v.* B. & M. R. Co.	683, 688
Addison *v.* Crow	360
Adler *v.* Pin	557, 644, 645
v. Potter	567
Adoue *v.* Seeligson	567, 719
Ætna Ins. Co. *v.* Tyler	662
Agar *v.* Young	532
Agnew *v.* Platt	86
Alabama R. Co. *v.* So. Ala. R. Co.	73, 598, 666
Alabama Warehouse Co. *v.* Jones	201
Albany *v.* Watervliet Turnp. Co.	684
Albany Ins. Co. *v.* Bay	352
Alderson *v.* Maddison	574
Aldrich *v.* Billings	456
v. Kinney	264, 292
Alexander *v.* State	341
v. Taylor	126
Allebough *v.* Coakley	87
Alleman *v.* Wheeler	482
Allen *v.* Ashley School Fund	395, 440
v. Blunt	101
v. Butman	97
v. Dundas	245
v. Frazer	581, 612
v. Goodnow	639
v. Griffin	514
v. Hodge	574
v. Holton	403
v. Kellam	671
v. Macpherson	211, 212
v. Maury	561
v. Morgan	148
v. Rundle	574
v. Shaw	595
v. Westbrook	571
Alley *v.* Adams Co.	685
Allie *v.* Schmitz	100
Allis *v.* Billings	497
v. Davidson	706
Allum *v.* Perry	629
Almy *v.* Thurber	639
Alner *v.* George	472
Alston *v.* Munford	147
Altman *v.* Klingensmith	344
Altschul *v.* Polack	131, 132, 134
Alvey *v.* Reed	605
American Emigrant Co. *v.* Iowa Land Co.	688, 689
American Tube Works *v.* Boston Mach. Co.	564
Amesti *v* Castro	67, 85, 129
Anaheim Water Co. *v.* Semi-Tropic Water Co.	584
Anderson *v.* Anderson	216, 302
v. Armstead	561, 603
v. Hubble	584, 585, 596, 612, 629, 699
v. Kimbrough	73
v. Wilson	207
v. Young	139
Andreae *v.* Redfield	627
Andrews *v.* Ætna Ins. Co.	639
v. Durant	198
v. Lyon	637
v. Montgomery	302
v. School District	53
v. Smith	103
Angell *v.* Johnson	561
Angle *v.* Northwestern Ins. Co.	565
Annett *v.* Terry	132
Anonymous	410
Ansdell *v.* Ansdell	101

	PAGE
Anstee v. Nelms	555
Anthony v. Bartholomew	567
v. Jasper	467, 468
Apollon, The	221
Archer v. Mosse	230, 245
Arkwright v. Newbold	255, 610, 616, 617
Armour v. Mich. Cent. R. Co.	473, 475, 623
Armstrong v. Carson	268
v. Wheeler	346, 441
Arnold v. Arnold	95, 98
v. Cheque Bank	457, 494, 629, 631, 655, 657
v. Richmond Iron Works	497
Arnott v. Redfern	258
Arthur v. State	204
Ashcraft v. De Armond	497, 498
Ashley v. Foreman	699
v. Martin	555
v. Vischer	471
Askins v. Coe	638
Aslin v. Parkin	75, 91, 97, 165
Athens v. Georgia Ry. Co.	671
Atkinson v. Allen	215, 306
v. McDonald	684
v. White	121
Atlanta v. Gate City Gas Co.	671
v. Word	671
Atlantic Dock Co. v. Leavitt	356, 357
Atlantic R. Co. v. Robbins	669
Att. Gen. v. Chicago R. Co.	160
v. Hooker	148
v. Marr	341, 598
v. Simonton	463
Audenried v. Betteley	575
Audubon v. Excelsior Ins. Co.	60
Audubon Co. v. American Emigrant Co.	688
Augusta v. Port Royal Ry.	671
Aurora City v. West	100, 153
Aurora Ins. Co. v. Kranich	664
Austin v. Charlestown Female Sem.	118
v. Craven	475
Averill v. Wilson	345, 358, 442
Avery v. Akins	402
v. Paine	79
Ayres v. Probasco	686

B.

B. C. R. & M. R. Co. v. Stewart	689
Babcock v. Camp	100
Bachelder v. Lovely	397
Badger v. Titcomb	198
Bailey v. Bailey	118
v. Fairplay	129
v. Kilburn	511
v. O'Connor	285
Baines v. Burbridge	117
Baird v. Jackson	587
v. United States	194
Baker v. Barclift	99, 514
v. Brannan	687
v. Hale	547
v. Home Life Ins. Co.	664
v. Humphrey	666
v. Johnson	668, 669, 715
v. McDuffie	642
v. Preston	146
v. Rand	276, 285
v. Stone	605
v. Stonebraker	209
v. Union Ins. Co.	471, 473
v. Whiting	545
Balch v. Shaw	38
Baldwin v. Hale	86, 690
v. McCrea	100, 201
v. Richman	640
v. Thompson	360
Bales v. Perry	627
Balkum v. Satcher	99
Ball v. Hooton	638
Ballou v. Jones	374
Baltimore R. Co. v. Vanderwarker	365
Baltzell v. Nosler	293
Bancroft v. White	344
v. Winspear	194, 198
Bandon v. Becher	213, 217, 219
Bank v. Flour Co.	401
Bank of America v. Banks	339, 352
Bank of Australasia v. Hardin	202, 290, 309
v. Nias	254, 260, 261, 265
Bank of Batavia v. Lake Erie R. Co.	598
Bank of Cadiz v. Slemmons	558
Bank of Cal. v. Shaber	149
Bank of Commerce v. Union Bank	487
Bank of Commonwealth v. Hopkins	56, 72
Bank of Hindustan v. Alison	564, 623
Bank of Ireland v. Evans Charities	457, 610, 655, 656
Bank of Lockhaven v. Mason	548
Bank of Old Dominion v. Allen	104
Bank of U. S. v. Bank of Georgia	492
v. Lee	600
v. Merchants' Bank	103, 310
v. Patton	104
Bank of Utica v. Mersereau	433
Barbell v. Gingell	491
Barber v. Hartford Bank	50
v. Lamb	261
Barboro v. Occidental Grove	463
Barham v. Tuberville	606, 715
Baring v. Claggett	241
Barker v. Benninger	644
v. Circle	339
v. Cleveland	183

	Page
Barlow v. Bishop	496, 498
Barnard v. German Seminary	557
Barnes v. Gibbs	313
Barnesley v. Powell	210, 212
Barnet v. Smith	504
Barnett v. So. London Tramways Co.	349, 566
Barney v. Dewey	136
v. Douglass	141, 314
v. Keniston	638
v. Patterson	150, 264, 286
Barrett v. Birge	143
v. Joannes	582
Barringer v. Boyd	281
v. King	252, 294
Barron v. Cobleigh	549, 568, 578
Barrow v. Barrow	675
v. West	139, 301
Barrows v. Kindred	129
Barrs v. Jackson	160
Barstow v. Savage Mining Co.	612
Barter v. Greenleaf	476
Bartholomew v. Jackson	686
Bartlett v. Bangor	370
v. Kauder	588, 609
v. Knight	264
v. Wells	605
Barton v. Anderson	77, 78
v. Smith	139
Barwick v. Rackley	679
v. Thompson	513
Bascom v. Manning	177
Basher v. Wolf	585
Bassett v. Bradley	636
v. Holbrook	645
v. Mitchell	163
Basten v. Butler	170
Bates v. Ball	718
v. Illinois Cent. R. Co.	341
v. Leclair	581
v. Norcross	342
Battey v. Button	77
Bauer v. Gottmanhauser	620
Baxley v. Linah	813
Baxter v. New England Ins. Co.	46, 240, 241, 250
v. Vincent	139
Baylor v. Dejarnette	150
Bazemore v. Freeman	621
Beal v. Smith	822
Beall v. Beck	146
Beals v. Lewis	562
Bean v. Smith	102
v. Welsh	430
Beatty v. Kurtz	635, 668
Beaupland v. McKeen	617, 716
Becquet v. McCarthy	261, 262, 263, 302
Beddow v. Beddow	70, 71
Beebe v. Knapp	610
v. Swartwout	357
Beekman Street, In re	68
Beeman v. Duck	483, 485, 488
Beere v. Fleming	59, 202
Behler v. Weyburn	600
Behrens v. Germania Ins. Co.	639
Belcher v Chambers	204
Bell v. Banks	105
v. Craig	555
v. Dagg	134
v. McCulloch	100
v. Shafer	549, 567
v. Todd	370
Bellas v. McCarty	436
Bellcairn, The	58, 72, 73
Belle of the Sea	578
Bellinger v. Craigue	176, 178, 183
Belmont v. Coleman	187
Beloit v. Morgan	100
Belshaw v. Moses	152, 153, 154, 169, 172
Bemis v. Call	599
Bendernagle v. Cocks	194, 198
Benjamin v. Gill	554
Bennecke v. Ins. Co.	662
Bennett v. Dean	578
v. Denny	53, 284
v. Farnell	486
v. Hood	122
v. Judson	610
v. Van Syckel	718
Bennitt v. Star Mining Co.	136, 153
Bensley v. Burdon	397, 424, 440
Benson v. Bennett	472
v. Matsdorf	97, 165
Benton v. Benton	514
v. Burgot	264
Berger v. Williams	137, 146
Berkley v. Watling	475
Bernard v. Hoboken	100, 101
Bernardi v. Motteux	237, 241, 248
Berringer v. Payne	194
Bethlehem v. Watertown	232
Betteley v. Reed	551
Betts v. Brown	622
v. New Hartford	114
v. Starr	90, 183
v. Wurth	506
Bevens v. Weil	561
Beveridge v. New York R. Co.	101
Beverly v. Lincoln Gaslight Co.	509
Beymer v. Bonsall	124
Bickerton v. Walker	473
Bickett v. Nash	80, 143, 346
Bickford v. First National Bank	504
Bicknell v. Field	308
Biddle v. Bond	548, 550, 551, 552
v. Wilkins	702
Biddulph v. Ather	229
Bigelow v. Foss	715
v. Winsor	58, 88, 99
Biggins v. People	84, 152
Bilsland v. McManomy	111
Bimeler v. Dawson	264

	Page
Binck *v.* Wood	77
Bingham *v.* Weiderwax	435
Birch *v.* Funk	53
v. Hutchings	638
v. Wright	543, 544
Birckhead *v.* Brown	188
Birdsey *v.* Butterfield	573
Birke *v.* Abbot	371
Bishop *v.* Hayward	111
v. Lalouette	511, 514
Bissell *v.* Briggs	264, 266, 268, 290
v. Jeffersonville	469
v. Kellogg	114, 160, 161
v. Spring Valley	56, 57, 80, 90, 153, 189, 468
Bivins *v.* Vinzant	437
Bixby *v.* Adams Co.	689
Black *v.* Dressell	686
Blackburn *v.* Bell	375, 627
v. Crawfords	227
Blackhall *v.* Gibson	369, 375, 382
Blackham's Case	210, 229
Black River Co. *v.* Clarke	466
Blackwood *v.* Brown	135
Blain *v.* Harrison	449
Blair *v.* Bartlett	176
v. Wait	629
Blake *v.* Bunbury	675
v. Douglass	118, 204
v. Exchange Ins. Co.	662
v. Fash	713
v. Foster	393
v. Sanderson	514
Blake Crusher Co. *v.* New Haven	617
Blakeslee *v.* Mobile Life Ins. Co.	399
Blanchard *v.* Brooks	402, 403
v. Ellis	430, 431, 434
v. Tyler	338
Blanchet *v.* Powell's Co.	475, 622
Blasdale *v.* Babcock	134
Bleven *v.* Freer	476, 567
Blight *v.* Rochester	345, 358, 442
Bliss *v.* Keweah Canal Co.	467
Block *v.* Comm'rs	376, 469
Blodgett *v.* Dow	69, 154
v. Jordan	322
v. Perry	569, 578, 582
Bloomington *v.* Brokaw	688
Blount *v.* Darrach	268
Board *v.* Board	346, 555, 674
Board of Commissioners *v.* Karp	66
v. Welch	75, 297
Board of Education *v.* Bakewell	684
Board of Public Works *v.* Columbia College	297
Board of School Directors *v.* Hernandez	114
Bobbitt *v.* Shryer	561, 262
Bobe *v.* Stickney	100
Bobo *v.* Richmond	622
Bodine *v.* Killeen	561
Bodurtha *v.* Goodrich	209, 293, 296
v. Phelon	76, 177
Bogardus *v.* Clark	212, 232, 245
Bogg *v.* Shoab	399
Boggs *v.* Olcott	563, 693
Bohon *v.* Bohon	389
Boileau *v.* Rutlin	156
Bold Buccleugh, The	50, 234
Bole *v.* Horton	387
Bolling *v.* Petersburg	714
v. Teel	346
Bolton *v.* Brewster	207
v. Gladstone	237, 241
Bond *v.* Carroll	346
Bonesteel *v.* Todd	104
Bonham *v.* Bishop	717
Bonomi *v.* Backhouse	172
Bonsall *v.* Isett	206, 207, 290
Boone *v.* Armstrong	395, 412
v. St. Paul Foundry Co.	88
Borden *v.* Fitch	207, 302
Borer *v.* Chapman	80
Bornheimer *v.* Baldwin	346
Borrowscale *v.* Tuttle	58
Bosch *v.* Kassing	78
Bosquett *v.* Crane	154
Boston *v.* Worthington	138
Boston Water Co. *v.* Gray	69, 70, 71
Boston & W. R. Co. *v.* Sparhawk	216, 306
Boswell *v.* Otis	297
Botts *v.* Fultz	574
Boubede *v.* Aymes	719
Bouchaud *v.* Dias	56, 57
Boucher *v.* Lawson	244, 260, 303
Bouchier *v.* Taylor	47, 160
Bowen *v.* Bowen	214, 718
v. Hastings	107
Bower *v.* McCormick	369
Bowers *v.* Keesecker	545, 546
Bowes *v.* Foster	471, 472
Bowman *v.* Taylor	368, 397
Bowne *v.* Potter	344
Box *v.* Barrett	676
Boyce *v.* Kalbaugh	636
v. Methodist Church	463, 467, 468, 469
Boyd *v.* Alabama	100, 340
v. Plumb	503
Boykin *v.* Cook	147, 148
Boyle *v.* Boyle	229
v. Wallace	129
v. Webster	721
Boynton *v.* Braley	584, 612, 617
v. Morrill	87
Brackenridge *v.* Howth	621
Brackett *v.* People	53
Bradbury *v.* Cony	620
Braden *v.* Graves	71
Bradley *v.* Briggs	152
v. Coolbaugh	719

	Page
Bradley v. Luce	586, 587
v. Rogers	717
Bradstreet v. Neptune Ins. Co.	221, 240, 249, 251, 296
Brady v. Huff	164
v. Pryor	153
Braithwaite v. Gardiner	497
Bramble v. Kingsbury	596
Branch v. Jesup	465, 466, 686
Brandriff v. Harrison	688
Brannon v. Noble	138
Bransby v. Kerridge	229
Branson v. Wirth	341, 360
Brant v. Virginia Coal Co.	627, 629, 631
Bramley v. Wolf	606
Brasfield v. Lee	171
Braxton v. Freeman	678
Brazee v. Schofield	346
Breeding v. Stamper	684
Breeze v. Brooks	618, 631, 665
Brengle v. McClellan	273
Bresee v. Stiles	229
Brevoort v. Brevoort	79
Brewer v. Boston & W. R. Co.	557, 619
v. Sparrow	718
Brewster v. Madden	544
v. Striker	573
Bridge v. Johnson	63
v. Sumner	55
Bridgeport Ins. Co. v. Wilson	133, 134
Bridgeport Sav. Bank v. Eldredge	207
Briggs v. Bowen	699
v. Hodgdon	552
Brigham v. Fayerweather	46, 47, 48, 150, 151, 161, 164, 222, 223, 224, 230, 231, 232, 242, 246, 247, 584
v. Smith	404
Brightman v. Hicks	459, 574
Bringard v. Stellwagen	595
Brinsmead v. Harrison	105
Bristow v. Warde	676
Britten v. Webb	111
Britton v. Thornton	129
Broadwell v. Merritt	464
Brock v. Young	346
Broda v. Greenwald	201
Broderick's Will	211, 212
Brooke v. Haymes	367
v. New York R. Co.	475, 598
Brooklyn v. Ins. Co.	134, 470
Brooks v. Curtis	666
v. Hill	137
v. Martin	581
Broome v. Wooton	105
Broughton v. McIntosh	77
Brouwer v. Appleby	466
Brown v. Birdsall	275
v. Bowen	716, 717
v. Bradford	132
v. Brown	346, 709
Brown v. Cambridge	112
v. Clarke	104
v. Coon	600
v. Davis	642
v. Driggers	688
v. Dudley	139
v. Dysinger	530
v. Gallaudet	186
v. Hamil	567
v. Jackson	402
v. Johnson	107
v. Leckie	504
v. Lexington & D. R. Co.	286, 313
v. McCormick	436
v. McCune	605
v. McKinally	181, 191
v. Mayor	102
v. Moran	718
v. Neale	188
v. Newall	57
v. Nichols	209
v. Phillips	395, 412
v. Ricketts	674
v. Sprague	56, 72
v. Staples	359, 361, 402
v. Summerville	138, 139
v. Taylor	132
v. Tucker	620
v. Wheeler	715, 716
Browning v. Crouse	664
v. Hanford	642
Brownsville v. Cavazos	129
v. Loague	103
Broyles v. Nowlin	669
Bruce v. Cloutman	206
v. United States	378
v. Wood	340, 449
Brudnell v. Roberts	393
Brugman v. McGuire	564
Brummagim v. Ambrose	78
Brunsden v. Humphrey	154, 169, 171, 172, 173
Bryan v. Des Moines	685
v. Malloy	87, 142
v. Uland	79
Bryans v. Nix	446
Buchanan v. Hubbard	606
v. Keines	831
v. Litchfield	376, 469
v. Matlock	213
v. Rucker	259, 288, 302
Bucher v. Cheshire R. Co.	55, 56
Buck v. Milford	618, 627
Buckingham v. Hanna	433
v. Ludlum	108
Buckland v. Johnson	200
Buckley v. Stevens	721
Bucklin v. Bucklin	86, 690
Buckner v. Archer	299
Buena Vista Co. v. Iowa Falls R. Co.	689
Buffington v. Cook	101

	Page
Buford v. Kirkpatrick	281
Bulkley v. Morgan	683
Bull v. Church	678
v. Rowe	618
Bullard v. Hascall	476
Bullis v. Noble	615
Bumstead v. Read	204
Bunger v. Roddy	545
Bunker v. Tufts	100, 142
Bunkley v. Lynde	372
Bunting's Case	227
Bunting v. Lepingwell	47, 227, 229
Burchfield v. Moore	485
Burdick v. Michael	584
Burgess v. Badger	552
v. Merrill	111
v. Northern Bank of Ky.	484
v. Seligman	563, 564, 574, 578, 642
Burk v. Hill	117
v. Simonson	693
v. Webb	567
Burke v. Adams	600, 618, 638
v. Allen	497, 498
v. Elliott	66
v. Miller	60
Burkhalter v. Edwards	715
Burkinshaw v. Nicolls	580
Burlen v. Shannon	51, 59, 61, 100, 152, 154, 160, 164, 227, 228, 244, 245, 247, 252, 297, 729
Burley v. Russell	605
Burlington v. Gilbert	689, 691
v. Merchants' Bank	698
Burlington R. Co. v. Harris	698
Burn v. Carvalho	202
Burnap v. Campbell	139
Burnes v. St. Louis Ry. Co.	60
Burnett v. Smith	177, 186, 187
Burnham v. Webster	264, 285
Burns v. Hodgdon	79
Burpee v. Sparhawk	114, 209, 802, 672
Burritt v. Belfy	85, 171, 194, 197, 198
Burroughs v. De Couts	79
v. Jamineau (see Burrows v. Jemino)	260
Burrowes v. Lock	614
Burrows v. Guthrie	68
v. Jemino	229, 262
Bursley v. Hamilton	373, 549, 567
Burt v. Sternburgh	88, 703
Burton's Appeal	565
Burton v. Curyea	475
v. Reeds	435
Burwell v. Cannaday	164
Bush v. Bush	684
v. Cooper	406
v. Marshall	357, 545, 546
v. Person	445
Busteed, The	59
Butchers' Assoc. v. Boston	638
Butchers' Bank v. McDonald	464
Butler v. Hildreth	55
v. Miller	192, 193
v. O'Brien	684
v. Suffolk Glass Co.	187
Butterfield v. Smith	229
Buttrick v. Allen	264
v. Holden	114, 116
v. Lowell	689
Bynum v. Preston	569
Byrne v. Hibernia Bank	685
v. Minneapolis Ry. Co.	172

C.

Cabot v. Washington	100, 282
Cadaval v. Collins	191, 220
Cady v. Dyer	593
v. Eggleston	382
v. Owen	584
Caffrey v. Dudgeon	349
Cagger v. Lansing	129
Cagwin v. Hancock	376, 469
Cahall v. Citizens' Bldg. Assoc.	464
Cailleteau v. Ingouf	283
Cain v. Sheets	114
Caird v. Moss	179, 181, 182, 191
Cairncross v. Lorimer	650
Cairns v. O'Bleness	686
Caldwell v. Hart	597, 598
v. Neely	357
v. Smith	6, 514, 517, 527, 722
v. Walters	117
Calhoun v. American Emigrant Co.	461
v. Dunning	129
v. Richardson	583, 624
Calkins v. Allerton	125
v. Copley	366
Callahan v. Griswold	215
Callandar v. Dittrich	737
Callaway v. Johnson	717
Callen v. Ellison	203
Calvert v. Bovill	247, 249
v. Sebright	403
Cambridge Inst. for Sav. v. Littlefield	589
Camden v. Werninger	72
Cameron v. Stephenson	669
v. Wurtz	273
Cammell v. Sewell	216, 223, 243, 262, 306, 307
Camp v. Moseley	599
Campau v. Campau	346, 358
v. Lafferty	506, 527
Campbell v. Birch	597
v. Charter Oak Ins. Co.	721
v. Frankem	627
v. Goodall	153
v. Hall	143, 348
v. Hastings	564
v. Hunt	53, 57

	Page
Campbell *v.* Knights	344, 345
v. Laclede Gas Co.	605
v. Phelps	120, 122
v. Rankin	87
v. Trunnell	460, 466
Campbell Printing Co. *v.* Walker	153, 193
Canal Bank *v.* Bank of Albany	483, 490, 632
Candee *v.* Clark	274
v. Lord	48, 146, 150, 151, 224
Candler *v.* Lunsford	341
Canfield *v.* Smith	692
Cannam *v.* Farmer	604
Canning *v.* Brown	638
v. Harlan	584
Cannon *v.* Home Ins. Co.	617, 662
Capital Bank *v.* Armstrong	494
Carder *v.* Fayette Co.	678
Carey *v.* Gunnison	547
Carithers *v.* Stuart	337, 339
Carleton *v.* Bickford	270, 296
v. Washington Ins. Co.	203, 204, 205, 206
v. Woods	198
Carley *v.* Wilkins	610
Carlin *v.* Brackett	57
Carlisle *v.* McCall	60
Carll *v.* Oakley	718
Carlton *v.* Davis	132
Carmack *v.* Lovett	476
Carman *v.* Townsend	299
Carnarvon *v.* Villebois	36, 234
Carolina R. Co. *v.* McCaskill	665
Carpenter *v.* Buller	331, 345, 352, 353, 361, 365, 380, 381, 382, 573
v. Carpenter	603, 605
v. Pier	322
v. Thompson	510
Carr *v.* London Ry. Co.	570, 585, 629, 631, 653
v. Miner	214, 473
v. Townsend	119
v. United States	131, 132, 340
v. Wallace	587
Carrier *v.* Sears	497, 498
Carrigan *v.* Bozeman	366
Carrington *v.* Merchants' Ins. Co.	224
Carroll *v.* Smith	376, 467, 469
Carson *v.* Faunt	507
v. New Bellevieu Cem. Co.	389
Carter *v.* Bennett	274
v. Carter	70, 352
v. Doe	399
v. Fately	561
v. James	155
v. Marshall	527, 534
v. Shibles	87
Caruthers *v.* Crockett	622
Carver *v.* Astor	341, 409
v. Jackson	397, 442
Carver *v.* Lewis	230
Carvill *v.* Garrigues	195
Case *v.* Beauregard	39, 52, 58
v. Boughton	610
v. Case	312
v. Reeve	135
v. Shultz	549, 568
v. State	68
Casebeer *v.* Mowry	725, 729
Casey *v.* Galli	66, 629
v. Inloes	586, 666
Casler *v.* Shipman	130
Cassidy *v.* Carr	67
Castle *v.* Noyes	119, 135, 183
Castner *v.* Farmers' Ins. Co.	661
Castrique *v.* Behrens	217, 254, 307
v. Imrie	45, 46, 49, 116, 223, 242, 247, 255, 262, 263, 264
Caswell *v.* Fuller	562
Catherwood *v.* Watson	603
Catlin *v.* Gilders	292
Caton *v.* Caton	576
Catskill Bank *v.* Stall	508
Cavan *v.* Darlington	677
Caylus *v.* New York R. Co.	168
Cecil *v.* Cecil	232
v. Early	378
Central Agric. Assoc. *v.* Gold Ins. Co.	466
Central R. Co. *v.* Smith	36, 75
Central R. R. *v.* Henderson	460, 466
Central Ry. Co. *v.* Kisch	579
Certain Logs of Mahogany	50
Chaffe *v.* Morgan	638
Chamberlain *v.* Carlisle	152
v. Faris	301
v. Gaillard	702, 703
v. Preble	73, 133
v. Spargur	332, 384
Chambers *v.* Falkner	466
Champlain R. Co. *v.* Valentine	382
Chandler *v.* White	629
Chant *v.* Reynolds	134
Chapin *v.* Curtis	57
Chapman *v.* Abrahams	352, 399
v. Chapman	587
v. Crooks	622
v. Forsyth	86, 690
v. Goodnow	101, 228
v. Pingree	561, 586
v. Shepard	646
Charlestown *v.* County Comm'rs	618, 683
Chase *v.* Cheney	65
v. Haughton	141, 314
v. Walker	88
Chatauque Bank *v.* White	587
Chatauque Co. Bank *v.* Risley	360
Chatfield *v.* Simonson	571, 573, 709
Chauvin *v.* Wagner	398, 408, 440
Cheesman *v.* Exall	548, 549, 551

	Page
Cheever v. Wilson	245, 270
Chellis v. Coble	629
Cheney v. Selman	571, 719
Cheongwo v. Jones	138
Cherry v. Robinson	129
Chesham, In re	678, 675, 676
Chesnutt v. Frazier	53
Chester v. Bakersfield Assoc.	142
Chettle v. Pound	530
Chew v. Barnet	435, 436, 440
Chicago v. Cameron	153
Chicago v. Chicago R. Co.	598
v. McGraw	598
v. Robbins	132, 134
v. Sexton	598
v. Wright	636
Chicago Bldg. Assoc. v. Crowell	468
Chicago Ins. Co. v. Warner	664
Chicago Packing Co. v. Tilton	565
Chicago R. Co. v. Joliet	461
v. Knuffke	684
v. People	461, 621
v. Schaffer	87, 171, 172
v. Wiggins Ferry Co.	287
Chicago Ry. Co. v. Auditor Gen.	618
Chichester v. Chichester	290
Child v. Chappell	608
v. Eureka Powder Works	318, 725
Childs v. Hayman	79
Chiles v. Boothe	360
Chilton v. Scrugge	571
Chitty v. Glenn	104
Chope v. Detroit Plankroad Co.	340, 598
Chouteau v. Gibson	72, 99
Chrisman v. Harman	59
Christie v. Secretan	247, 249
Christmas v. Russell	216, 255, 270, 272, 282, 306, 308
Christopher, The	253
Chubb v. Upton	470
Chudleigh's Case	425
Churchman v. Ireland	674
Churchward v. Ford	509
Cicero v. Williamson	66
Cicotte v. Wayne	583
Cincinnati v. Cameron	686
v. Dickmeier	151
v. Morgan	470
v. White	636
Cincinnati R. Co. v. Mara	718
v. Wynne	318
City Bank v. Bartlett	684
City Bank of New Orleans v. Welden	57
Clapp v. Hansom	480
v. Tirrell	478
Claridge v. Mackenzie	518, 527
Clark v. Baker	198
v. Bryan	203, 204, 205
v. Carrington	132
v. Clark	571, 719
Clark v. Deshon	478
v. Dew	245
v. Fisher	212
v. Hayward	638
v. New England Ins. Co.	662
v. Parsons	264, 321
v. Sammons	168
v. Wiles	100, 187, 201
v. Wolf	125, 137
v. Young	53, 81
Clarke v. Clarke	517
v. Dunham	119
Clarke Nat'l Bank v. Bank of Albion	504
Clary v. Hoggland	208
Clauser v. Jones	699
Clay v. Buchanan	54, 722
v. Smith	86, 672, 690
Clay Ins. Co. v. Huron Salt Co	468
Cleaton v. Chambliss	81
Clementson v. Gandy	677
Clerk v. Withers	643
Cleveland v. Creviston	86
Clews v. Bank of New York	486, 499
v. Bathurst	229
Clink v. Thurston	699
Clinton v. Haddam	617
Clinton Bank v. Hart	107
Close v. Glenwood Cem.	464, 466
Cloud v. Whiting	581
Clough v. London Ry. Co.	683
Coakley v. Perry	560
Coari v. Olsen	583
Cobb v. Arnold	533
v. Curtiss	177
v. Fisher	330, 332
Coburn v. Goodall	152
v. Palmer	538
Cochran v. Arnold	466
Cockburn v. Thompson	136
Cocke v. Brogan	399
Cocks v. Masterman	490
Codington v. Lindsay	675
Coe v. Clay	408
v. Gerst	598
Coffey v. United States	152, 157, 226
Coffin v. Knott	57
Coffman v. Brown	56
Coggill v. American Bank	483, 484, 485
Cohen v. Teller	491, 492
Coit v. Beard	55
v. Haven	208
Cole v. Favorite	136
v. Lafontaine	699
v. Raymond	431, 432, 445
v. Stone	322, 705
Coleman v. McAnulty	119
v. McMurdo	148, 318
v. Pearce	611, 699
v. Pike	684, 685
Coles v. Allen	143

	Page
Coles *v.* Soulsby	477
Collier *v.* Gamble	408
Collingwood *v.* Irvin	134
Collins *v.* Bartlett	358, 442
v. Bennett	176
v. Jennings	60
v. Lofftus	186
v. Mitchell	373
v. Wood	674
Collis *v.* Emmett	485
Coloma *v.* Eaves	469
Colonial Bank *v.* Hepworth	495, 572
Colonius *v.* Hibernia Ins. Co.	638
Colquitt *v.* Smith	562
Colt *v.* Partridge	51
Colter *v.* Calloway	688
Columbet *v.* Pacheco	621
Columbian Ins. Co. *v.* Lawrence	664
Columbus *v.* Dahue	636
Colvin *v.* Corwin	198
Colwell *v.* Brower	561
Combes *v.* Chandler	562
Comings *v.* Wellman	382
Commercial Bank *v.* Pfeiffer	464
Commissioners *v.* Bolles	464
Commonwealth *v.* André	341
v. Blood	205, 251, 252, 294
v. Dudley	672
v. Green	270, 273, 291
v. Moltz	587, 617
v. Reading Bank	468, 499
v. Rourke	552
v. Sherman	467, 606, 607
Companies Acts, In re	349, 467
Compher *v.* Anawalt	281
Compton *v.* Sandford	719
Comstock *v.* Smith	372, 400, 403
Conant *v.* Newton	349, 365
Conard *v.* Atlantic Ins. Co.	475
Concha *v.* Concha	46, 47, 93, 102, 221, 222, 223, 230, 231, 232, 237, 241, 245, 246, 247, 248, 675
Concord *v.* Bellis	600
Congregational Soc. *v.* Perry	466
Conkey *v.* Hawthorne	638, 645
Conklin *v.* Barton	564
v. Conklin	574
Connecticut Ins. Co. *v.* Schwenk	571
Connelly *v.* Connelly	244
Connihan *v.* Thompson	673, 679
Connolly *v.* Branstler	603
v. Connolly	230
Connor *v.* Eddy	359, 412
v. Martin	496
Conrad *v.* Lane	605
Continental Bank *v.* Nat'l Bank	500, 585, 629, 639
Conway *v.* Ellison	281
Conwell *v.* Mann	511
Cook *v.* Burnley	59, 152
v. Field	138
Cook *v.* Harnes	598
v. McCahill	571
v. Parham	347
v. Pridgen	666
v. Sholl	225
v. Steuben Bank	276
v. Thornhill	276
v. Toumbs	340
Cooley *v.* State	571
Coons *v.* People	685
Cooper *v.* Adams	538
v. Blandy	511
v. Meyer	485, 486
v. Peck	567
v. Reynolds	49, 52, 275, 297, 302
v. Watson	345, 346, 356
v. Witham	604
Copeland *v.* Copeland	715
Copin *v.* Adamson	265, 289
Copper Mining Co. *v.* Ormsby	557
Corbet's Case	229
Corbett *v.* Brown	579
Corbley *v.* Wilson	116
Corcoran *v.* Chesapeake Canal Co.	102, 131, 186
Corder *v.* Dolin	547
Corey *v.* Gale	76
v. Ripley	302
Corkhill *v.* Landers	620
Corning *v.* Troy Iron Factory	593
Cornish *v.* Abington	534, 632
v. Searell	523, 581, 539
Corrothers *v.* Sargent	99
Corry *v.* Gaynor	688
Corwith *v.* Culver	462
Cotes *v.* Davies	496
Cothran *v.* Brower	73, 460
Cotton *v.* New Providence	469
Counterman *v.* Dublin	465, 689
Courtland *v.* Willis	172, 706
Coventry *v.* Great Eastern Ry. Co.	475, 585, 612, 615, 622, 655, 656
Covert *v.* Nelson	138
Covington & L. R. Co. *v.* Bowler	137
Cowell *v.* Springs Co.	347, 465, 466
Cowles *v.* Marks	340
Cox *v.* Bruce	349, 566
v. Rogers	674
v. Thomas	208, 373, 694
Coxe *v.* Nicholls	281
Craddock *v.* Turner	146
Crafts *v.* Clark	705
Cramer *v.* Moore	59
Crane *v.* Maginnis	244
v. Morris	360
v. Reeder	341
Cravens *v.* Kitts	629
Crawford *v.* Howard	205
v. Jones	511
v. Nolan	698
v. Turk	146

	Page
Crawford *v.* White	305
v. Whittal	257
Crawley *v.* Isaacs	261
Creagh *v.* Blood	525
Crenshaw *v.* Julian	117
Crest *v.* Jack	587
Crichlow *v.* Parry	483
Crime *v.* Davis	577
Croft *v.* Johnson	60
Crofton *v.* Cincinnati	152
Crofts *v.* Middleton	398, 424
Cromwell *v.* Sac	76, 78, 80, 87, 90, 96, 153, 166, 169, 186, 187, 188, 189, 220, 376, 469
Cronan *v.* Frizell	131
Cronin *v.* Gore	622
Crouk *v.* Trumble	717
Cropper *v.* Smith	638
Crosland *v.* Murdock	211, 212
Cross *v.* Kansas	692
Crossan *v.* May	581, 639
Crossley *v.* Dixon	553
Croudson *v.* Leonard	45, 221, 222, 240
Crout *v.* De Wolf	491
Croxall *v.* Shererd	547
Cruger *v.* Dougherty	669, 683
Crum *v.* Boss	88, 164
Crumb *v.* Wright	345, 357, 545, 546, 547
Crusoe *v.* Butler	245
Cumberland Coal Co. *v.* Jeffries	66
Cumberland R. Co. *v.* McLanahan	666
Cummings *v.* Banks	264
v. Powell	345, 346, 358
Cummins *v.* Agricultural Ins. Co.	571
Cunningham *v.* Ashley	146
v. Goelet	290
v. Milner	562
v. Shanklin	340
Cupp *v.* Campbell	600, 603, 604
Curlee *v.* Smith	346
Curnen *v.* New York	461
Curran *v.* Burdsall	446
Curtis *v.* Galvin	538
v. Gibbs	268
v. Leavitt	150
v. Spitty	509
Curtiss *v.* Beardsley	312
Curvea *v.* Berry	713
Cushing *v.* Laird	101, 102, 221, 222
Cuthbertson *v.* Irving	362, 363, 539, 540
Cuthrell *v.* Hawkins	396, 428
Cutler *v.* Bower	372
v. Dickinson	373
Cutter *v.* Evans	123, 146, 150
v. Waddingham	360
Cutting *v.* Carter	70
Cyphert *v.* McClune	281

D.

	Page
Da Costa *v.* Villa Real	229
Daggett *v.* Daggett	153
Dahlman *v.* Forster	36
Dair *v.* United States	562
Dale *v.* Turner	699
Dalgleish *v.* Hodgson	241
Dalton *v.* Whittem	687, 718
Damouth *v.* Klock	684
Damp *v.* Dane	692
Dancer *v.* Hastings	539
Dane *v.* Gilmore	132
Danforth *v.* Adams	629
Daniel *v.* Morton	717, 719
Daniels *v.* Edwards	661
v. Equitable Ins. Co.	638
v. Henderson	115, 154
v. Tearney	352, 467, 673, 689, 690
Darby *v.* Mayer	212
D'Arcy *v.* Ketchum	270
Darke *v.* Bush	571
Darley Colliery Co. *v.* Mitchell	171, 172
Darlington *v.* Gray	69
v. Pritchard	738
Darst *v.* Gale	467
Dashiel *v.* Collier	344
Davenport *v.* Chicago R. Co.	85
v. Tarpin	620
Davenport R. Co. *v.* Davenport Gas Co.	578, 611
David *v.* Park	627
v. Porter	272
Davidson's Appeal	599
Davidson *v.* Sharpe	316
v. Shipman	152
v. State	119, 127, 130
v. Young	600, 629, 638
Davies, Ex parte	552
Davies *v.* New York	194
Daviess *v.* Dickinson	467, 470
Davis *v.* Bean	60
v. Bowmar	582, 629, 638
v. Brown	90, 169, 188, 480
v. Callahan	562
v. C. R. Co.	572
v. Connelly	279
v. Davis	514, 715
v. Dyer	639
v. Hedges	177, 179, 181, 182, 187
v. Henry	69, 70, 621
v. McCorkle	99, 152
v. Rainsford	370
v. Russell	475
v. Shoemaker	510, 708
v. Smith	629
v. Tallcot	175, 176, 178
v. Tingle	603
v. Tyler	510
v. Zimmerman	603
Davis Machine Co. *v.* Barnard	114, 230
Dawley *v.* Brown	84, 129

	Page
Dawson *v.* Mann	191
Day *v.* Case	180
v. Hartshorn	101
v. Perkins	709
Dean *v* Colt	406
v. Doe	409
v. Thatcher	73
De Armond *v.* Adams	215
Decherd *v.* Blanton	373
Decker *v.* Adams	76
Decorah Mill Co. *v.* Greer	617
De Cosse Brissac *v.* Rathbone	260, 261
De Ende *v.* Wilkinson	281
Deery *v.* Cray	382
Deford *v.* Mercer	685
De La Guerra *v.* Newhall	86
Delancey *v.* McKeen	600
Delaney *v.* Dutcher	331
v. Fox	522, 541
Delanney *v.* Burnett	60
Delano *v.* Jopling	294
Delaplaine *v.* Hitchcock	713
De La Vega *v.* League	79
Delmege *v.* Mullins	517
Delphi *v.* Startzman	699
Delta, The	100
Demarest *v.* Darg	100, 102
De Mill *v.* Moffatt	713
Deming *v.* Darling	573, 574
De Mora *v.* Concha	45, 46, 47, 48, 93, 102, 221, 223, 224, 230, 231, 232, 237, 241, 245, 246, 247, 675
Dempsey *v.* Ins. Co. of Penn.	241
Den *v.* Ayres	212
v. Reddick	63
d. Bufferlow *v.* Newsom	542
d. Gilliam *v.* Bird	346
d. Grandy *v.* Bailey	542
d. Johnson *v.* Watts	345
d. Love *v.* Edmonston	547
d. Love *v.* Gates	346, 442
d. Williams *v.* Bennett	542
Denegre *v.* Hann	104
Denison *v.* Hyde	247, 293
Denman *v.* Nelson	377
Denn *v.* Cornell	360, 397
Dennett *v.* Chick	109
Denny *v.* Bennett	53, 114, 284
v. Willard	642
v. Williams	198
Dent *v.* Ashley	318
v. Smith	262
Denton *v.* Noyes	281
v. Stewart	614
De Proux *v.* Sargent	100
Derby *v.* Jacques	55
v Johnson	194
De Rochemont *v.* B. & M. R.	382
Derry *v.* Peek	610
Deslonde *v.* Darrington	280
Despard *v.* Walbridge	538
Destrehan *v.* Scudder	280
Detroit Ry. Co. *v.* Hayt	723
Devens *v.* Mechanics' Ins. Co.	663
Devin *v.* Ottumwa	135
Dewey *v.* Bell	681
v. Field	373, 374, 476, 549, 567, 568, 569, 646, 665, 710
Dexter *v.* Clark	55
Dey *v.* Dox	77
Dezell *v.* Odell	373, 374, 476, 567, 646, 709
Dickerson *v.* Colgrove	715
Dickinson *v.* Goodspeed	538
v. Hayes	159, 161
Diehl *v.* Zanger	621
Dillett *v.* Kemble	621
Dillinger *v.* Kelley	53, 56
Dills *v.* Hampton	542
Diossy *v.* Morgan	567
Divoll *v.* Atwood	60
Dixon *v.* Merritt	152
Doak *v.* Wiswell	176
Doane *v.* Willcutt	340, 375, 402, 404, 410, 449
Dobbins *v.* Cruger	395
v. Hyde	139, 140
Dobson *v.* Culpepper	513, 533
v. Pearce	202, 304, 305
Dodd *v.* Una	51, 114, 252
v. Williams	438, 441
Dodge *v.* Gaylord	71
v. Pope	566, 627
v. Stacy	715
Doe *v.* Derby	143, 348
v. Harlow	129
v. Huddart	129, 698
v. Skirrow	348
v. Thomas	129
v. Wellsman	733
d. Baggaley *v.* Hares	350
d. Brinegar *v.* Chaffin	382
d. Bristow *v.* Pegge	508
d. Bullen *v.* Mills	511, 512, 513, 520
d. Butcher *v.* Musgrave	378
d. Chandler *v.* Ford	351
d. Christmas *v.* Oliver	417
d. Clun *v.* Clarke	534
d. Higginbotham *v.* Barton	522, 536, 538, 544
d. Hornby *v.* Glenn	337
d. Hurst *v.* Clifton	515
d. Jackson *v.* Wilkinson	511, 532
d. Johnson *v.* Baytup	516, 542
d. Knight *v.* Smythe	507, 513, 516, 537
d. Levy *v.* Horne	350
d. McPherson *v.* Walters	713
d. Marchant *v.* Errington	348, 397
d. Marriott *v.* Edwards	538
d. Morris *v.* Rosser	716
d. Ogle *v.* Vickers	515

	Page
Doe d. Plevin v. Brown	523, 526
d. Potts v. Dowdall	432
d. Preece v. Howells	351
d. Shelton v. Shelton	376
d. Stevens v. Hays	351
d. Strode v. Seaton	391, 420
d. Taylor v. Shufford	341
d. Thompson v. Hodgson	720
d. Wheble v. Fuller	514
d. Worsley v. Johnson	345, 346, 357
d. Wright v. Smith	720
Doglioni v. Crispin	261
Dolde v. Vodicka	621
Dole v. Boutwell	139
Dolphin v. Robins	244, 297
Don v. Lippman	259, 289, 297
Donahue v. Klassner	358
Donald v. Gregory	143
Donaldson v. Hibner	621
v. Winter	212
Donnell v. Hamilton	63, 72
Donohoo v. Murray	370
Dooley v. Cheshire Glass Co.	463
v. Potter	114, 142
v. Wolcott	466
Dorlargue v. Cress	627
Dorr v. Clark	549, 567
v. Stockdale	147
Dorrance v. Scott	117
Dotterer v. Pike	603
Doty v. Brown	183
Dougald v. Dougherty	396
Dougherty's Est.	216
Douglas v. Forrest	259, 285, 289, 297, 301, 705
v. Fulda	131, 522
Douglass v. Craig	618
v. Howland	146, 150
v. Scott	432, 433, 441, 443
Dow v. Sanborn	50
Downer v. Shaw	294, 300
Doyle v. Coburn	384
v. Hallam	129
v. Hort	611
v. Mizner	464
v. Reilly	100
v. Wade	346
Drake v. Glover	603
v. Mitchell	193
v. Vorse	85
Drayton v. Dale	495, 496
Dresbach v. Minnis	374, 476, 549, 567, 646
Drexel v. Berney	557, 712
Dreyfous v. Adams	717
Drummond v. Prestman	150
Drury v. Foster	600, 602
Dublin v. Chadbourne	245
Dubois v. Dubois	212
Du Bose v. Ball	684
Duff v. Wynkoop	685
Duffield v. Scott	132
Duffy v. Lytle	725
Dugan v. Follett	395
Duke v. Ashby	454, 540
Dukes v. Spangler	340, 444, 578, 603
Duncan v. Bancroft	86
v. Holcomb	101
v. Ware	140
Dunckle v. Wiles	162
Dundas v. Hitchcock	374
v. Waddell	188, 202
Dunham v. Bower	152, 154, 176
v. Reilly	552
Dunklin v. Wilson	642
Dunks v. Fuller	666
Dunlap v. Clements	567
v. Cody	52, 307
v. Glidden	38
Dunn v. Pipes	72
Dunnell Manuf. Co. v. Pawtucket	693
Dunning v. West	717
Dunshee v. Grundy	511
Dunston v. Paterson	582
Dupas v. Wassell	459, 506
Durant v. Abendroth	52, 241, 297
v. Essex Co.	58, 63
v. Pratt	629, 637, 650
Durham v. Alden	715
Dutchess Cotton Manuf. Co. v. Davis	466
Dutton v. Woodman	88
Du Val v. Marshall	460
Dwight v. St. John	60
Dyckman v. New York	206, 207
Dyer v. Rich	382
v. Sutherland	564
Dykes v. Woodhouse	148, 318
Dynes v. Hoover	66

E.

Eagan Co. v. Johnson	660
Earl v. Stevens	636
Easly v. Walker	567
East v. Dolilite	644
East Ala. R. Co. v. Tenn. R. Co.	143, 453
Easterly v. Goodwin	49
Eastham v. Anderson	547
East Hampton v. Kirk	721
Eastman v. Symonds	164
Eastmure v. Laws	174, 201, 725, 733
Easton v. Aspinwall	687
v. Goodwin	567
v. Pickersgill	60
v. Wareham	663, 664, 665
Eaton v. Aspinwall	464, 466
Ebersole v. Latimer	76, 77
Eberts v. Fisher	79
Edgell v. Sigerson	96, 215
Edson v. Edson	217

	Page
Edwards's Appeal	719
Edwards v. Baker	86
v. Dickson	574
v. Rogers	343
Egerton v. Muse	74, 102
Egler v. Marsden	509
Ehle v. Bingham	128, 127, 188
Eikenberry v. Edwards	638, 644, 645
Eimer v. Richards	100
Eitelgeorge v. Mutual Bldg. Assoc.	638
Eldred v. Hazlett	197
Eldridge v. Hill	129
v. Trustees of Schools	396
v. Walker	561
Elkhart v. Simonton	68
Elliott v. Dycke	717
v. Hayden	112, 122
v. Frakes	131
v. Royal Assur. Co.	68
Ellis v. Davis	212
v. Hamlin	686
v. Ohio Life Ins. Co.	481, 490, 492
v. Welch	401
v. White	718
Ellsworth v. Ellsworth	683
v. Houlton	664
Elson v. O'Dowd	117
Elston v. Piggott	79
Embree v. Hanna	141, 311, 314
Embrey v. Palmer	79, 202, 268, 287, 288, 718
Embury v. Conner	154, 163, 204, 396, 687
Emerson v. Sansome	396
v. Thompson	97, 165
Emery v. Barnett	522
v. Fowler	121, 123
Eminence v. Grasser	468, 470
Emmes v. Feeley	517
Emmons v. Milwaukee	684
Engel v. Scheuerman	273, 304
England v. Slade	538
Engstrom v. Sherburne	77, 217, 218
Ennis v. Smith	47, 227
Enohin v. Wylie	230
Ensign v. Bartholomew	55
Epley v. Witherow	587
Eppes v. Mississippi R. Co.	466
Equitable Foundry Co. v. Hersee	688
Equitable Mortgage Co. v. Norton	569
Equitable Trust Co. v. Fisher	153, 182
Erskine v. Loewenstein	563
Erwin v. Down	498
v. Lynn	194
Eshelman v. Schuman	130
Espy v. Bank of Cincinnati	499
v. Comer	673
Esron v. Nicholas	606
Estep v. Larsh	57
Estey Manuf. Co. v. Runnels	466
Etcheborne v. Auzerais	674
Etting v. Bank of United States	63
Eureka Co. v. Bailey Co.	67, 553
Evans's Appeal	683
Evans v. Bicknell	557, 614, 615
v. Collier	118
v. Commonwealth	146
v. Edmonds	610
v. Forstall	627
v. Miller	620
v. Powel	367
Evelyn v. Haynes	95
Evertson v. Miles	610
Ewing v. Cook	687
v. Orr Ewing	230
Exchange Bank v. Ault	36, 38
Eyster v. Gaff	115

F.

Factors' Ins. Co. v. De Blanc	685
Fagg v. Clements	78
Fahnestock v. Gilham	721
Fairbanks v. Long	718
Fairchild v. Lynch	153
v. McArthur	345, 443
Faircloth v. Jordan	438
Fairtitle v. Gilbert	349, 467
Faithorne v. Blaquire	117
Falkner v. Guild	204
Fall River v. Riley	140
Fall River Bank v. Buffinton	652
Fanning v. Ins. Co.	698
Fargis v. Walton	666
Farish v. Coon	341
Farist's Appeal	629
Farley v. Eller	448
v. Pettes	562
Farmer v. Simpson	138
Farmers' & M. Bank v. Butchers' & D. Bank	500, 504
Farrar v. Cooper	380
v. Farrar	444, 578
v. Hutchinson	471
v. Olmstead	230
Farrington v. Payne	197
Farris v. Houston	517, 519, 523, 544
Farwell v. Hilliard	111
Father Matthew Soc. v. Fitzwilliams	373, 466
Faught v. Faught	160, 161, 164
Faulks v. Kamp	446
Favill v. Roberts	561, 712
Fawcett v. New Haven Organ Co.	629
Faxton v. Faxon	577
Fay v. Ames	184
v. Valentine	710
Feather v. Strohoecker	411
Feely v. Scott	206
Felt v. Turnure	57
Felton v. Smith	86, 97

	Page
Feltz v. Walker	581
Fenner v. Duplock	523, 524
Fenwick v. Thornton	131
Ferguson v. Bobo	605, 606
v. Crawford	86, 203, 206, 306
v. Landram	465, 687, 689, 690
v. Mahon	260, 262, 265
v. Milliken	331
v. Northern Bank	622
Fermor's Case	302, 303
Fernandez v. Da Costa	241
Ferrer's Case	95, 99
Ferson's Appeal	691
Field v. Doyou	687
v. Flanders	214
v. Seabury	67
Fields v. Bland	673
Fifield v. Edwards	110
Fine Art Soc. v. Union Bank	572, 658
Finlay v. Bryson	718
Finnegan v. Carraher	645, 716
Finneran v. Leonard	209
Finney v. Finney	201
First Evang. Church v. Walsh	572
First National Bank v. Gillilan	118, 466
v. Hammond	666
v. Hastings	154
v. McAllister	713
v. Ricker	492, 583
v. Warrington	720
First Parish v. Dow	533
Fischli v. Fischli	158
Fish v. Folley	194
Fishbeck v. Phœnix Ins. Co.	650
Fisher v. Banta	114
v. Longnecker	62
v. Milmine	544
v. Mining Co.	332, 346, 352
v. Ogle	249
v. Seligman	346, 563, 642
Fisk v. Miller	214
Fitch v. Baldwin	347, 357, 685
v. First National Bank	84
Fitts v. Cook	554, 679
v. Hall	605
Fitzgerald v. Spain	547
v. Turner	603
Fitzpatrick v. Flannegan	626
Fitzsimmons v. Newport Ins. Co.	222, 242
Flad Oyen, The	251, 253
Flagg v. Flagg	404
Flanagan v. Cutter	138
Flanigan v. Turner	684
Flannagin v. Hambleton	603
Flege v. Garvey	683
Fleischmann v. Stern	581
Fleming v. Gooding	511
Fleminer v. Travelers' Ins. Co.	396
Flersheim v. Cary	349
Fletcher v. Farrer	367
Fletcher v. Holmes	72
Flint v. Bodge	191
Flitters v. Allfrey	66
Florence v. Drayson	170
v. Jenings	169
Flower v. Elwood	578, 629
v. Lloyd	217, 254, 307
v. Parker	138
Floyd v. Ritter	36
Floyd Co. v. Morrison	460
Fogler v. Clark	86, 100, 690
Foley v. Cooper	561
Folger v. Palmer	5, 114, 135, 341, 571, 720
Follansbee v. Parker	617
v. Walker	119, 127
Foote v. Gibbs	58
v. Newell	298
Forcey's Appeal	152, 155
Ford v. Ager	519
v. Doyle	59
v. Ford	152, 160
v. Hurd	140
v. Loomis	561
v. Meacham	484
Forncrook Manuf. Co. v. Barnum Wire Works	553
Forster v. Forster	395
Foster v. Bigelow	718
v. Busteed	59
v. Charles	629
v. Dwinel	344
v. Jones	119
v. Wightman	345, 443
Fountain v. Whelpley	637, 650
Fountaine v. Carmarthen Ry. Co.	470
Fouque v. Burgess	598
Fourth Nat'l Bank v. Olney	460
Foust v. Chamblee	555
Fowler v. Parsons	665, 670
v. Shearer	76, 339, 448
Fowlkes v. State	87, 698, 702, 703
Fox v. Union Sugar Refinery	370
v. Whitney	480
Foye v. Patch	87, 153, 189, 697, 698, 699
Frame v. Badger	572
Francis v. Boston & R. Mill Corp.	355
Frank v. Frank	675
Franklin v. Green	101
v. Merida	527
v. Twogood	373, 464, 466
Fraser v. Pendlebury	352, 358
Frayes v. Worms	262, 285, 318, 705
Frazer v. Hilliard	446
Frazier v. McCloskey	172, 174
v. McQueen	104
v. Moore	309
Fredenburg v. Lyon Lake Church	578
Frederick v. Missouri River R. Co.	584
Freeman v. Auld	334, 371
v. Bass	168

	Page
Freeman v. Clute	184
v. Cooke 570, 610, 629, 630, 633, 634, 640, 641, 643,	699
Freison v. Bates College	60, 117
Fremont Ferry Co. v. Dodge Co.	666
French v. Donohue	466
v. Howard	100
v. Spencer	398
Freon v. Brown	480, 557
Fretwell v. McLenore	146
Frew v. Taylor	290
Frey v. Rawsour	396
Frick v. Trustees of Schools	565, 693
Frierson v. Branch	684
Frink v. Darst	399
Frost v. Frostburg Coal Co.	466
Fry v. Taylor	232
Fuller v. Eastman	60, 99, 152, 154
v. Shattuck	76
v. Sweet	527
Fulton v. Fulton	678
Funk v. Newcomer	360
Funkhauser v. How	139
Furness v. Williams	357
Fursman v. Fursman	229

G.

Gaff v. Harding	476, 567, 646
Gage v. Holmes	191
v. Pumpelly	79
Gaines v. Relf	216
Galbraith v Lunsford	600, 601, 606, 629
v. Neville	102, 257, 260
Gale v. Coburn	478
Galena & C. R. Co. v. Pound	207
Gallagher v. People	583
v. Riley	67
Galloway v. Finley	545, 546
Galpin v. Page	52, 204, 297, 301, 302
Gambetta v. Brock	117
Gammon v. Freeman	344
Ganong v. Green	660
Gans v. St. Paul Ins. Co.	699
Gansvoort v. Williams	503
Garber v. Doersom	717
Gardiner v. Suydam	446, 475
Gardner v. Boston	692
v. Buckbee	86, 88, 95, 703
v. Greene	356
v. Keteltas	407
v. Raisbeck	153
Garland v. Jacomb	488
v. Tucker	264
Garlinghouse v. Whitwell	639
Garnett v. Macon	147
Garrard v. Haddan	494
Garrick v. Chamberlain	58
Garrity v. Thompson	567, 719
Garwood v. Garwood	100
Gates v. Kerby	189
v. Preston	175, 178
Gatling v. Rodman	599
Gaus v. Chicago Ry. Co.	468
Gawtry v. Leland	671
Gay v. Parpart	74, 79, 102
v. Smith	206
Gayle v. Johnson	460, 552
v. Price	344
Gaylord v. King	68
v. Norton	69
v. Respass	345
Gear v. Smith	219
Gee v. Moss	639
Gelpcke v. Dubuque	470
Gelston v. Hoyt	225, 226
General Finance Co. v. Liberator Soc.	398, 408, 424, 428, 433, 439
General Nav. Co. v. Guillou	262, 290
George v. Bischoff	365
v. Swafford	595
v. Tate	567
Georgia R. Co. v. Hamilton	683
German v. Clark	578
German Sav. Inst. v. Jacoby	583
Germond v. People	351
Gerrish v. Black	168
Gibbs v. Bryant	107
v. Thayer	406
Gibson v. Chillicothe Bank	475
v. Chouteau	398
v. Kirk	509
v. Lyon	129
v. Minet	486
v. Rees	102
Giddens v. Crenshaw	661
Gilbert v. Manchester	669
Gilbreath v. Jones	112, 699, 702, 703
Gill v. Fauntleroy	347
v. Grand Tower Co.	406
v. Hardin	584
v. Read	228
Gillespie v. Nabors	605
Gillett v. Hill	647
v. Wiley	631
Gilman v. Haven	359
v. Hoare	392
v. Lockwood	86, 672, 690
Gilmore v. Fox	691
Gilston v. Codwise	217
Gingrass v. Iron Cliffs Co.	587
Ginnett v. Whittingham	65
Girard Bank v. Bank of Penn.	504
Glanvill, In re	676
Glasgow v. Baker	334
v. Lowther	264
Glazier v. Streamer	578
Gleason v. Dodd	291, 295
Glidden v. Strupler	600, 602
Gloucester Bank v. Salem Bank	493
Glover v. Benjamin	719

	Page
Glynn *v.* George	542
Goble *v.* Dillon	76, 179, 182
Godard *v.* Gray	222, 238, 242, 262, 268, 265, 309
Goddard's Case	697
Goddard *v.* Merchants' Bank	489, 490
v. Renner	685
Godfrey *v.* Brown	721
Goeing *v.* Outhouse	639
Goff *v.* Dabbs	73
Goit *v.* National Ins. Co.	471
Golconda *v.* Field	638
Gold *v.* Canham	260
Golightly *v.* Jellicoe	69, 166, 190
Gonzales *v.* Hukil	339
Goodall *v.* Marshall	321
Goodel *v.* Bennett	406
Goodell *v.* Bates	482, 492
Goodenough *v.* Fellows	339
Goodman *v.* Niblack	111, 114
v. Pocock	194
v. Randall	365
v. Winter	230, 467, 606, 607, 712
Goodnow *v.* Litchfield	114
Goodrich *v.* City	82, 100
v. Jenkins	276, 281
v. Reynolds	687
v. Yale	194
Goodson *v.* Beacham	440
Goodtitle *v.* Bailey	397, 407, 409
Goodwin *v.* Robarts	572
Gordinier's Appeal	129
Gordon *v.* Whitehouse	725
Gore *v.* Brazier	521
Gorham *v.* Brenon	396
v. Dodge	674
Gorrisson, Succession of	233
Gorton *v.* Roach	348
Gosling *v.* Birnie	550, 649
Gottfried *v.* Miller	446
Goucher *v.* Clayton	74
Goudy *v.* Hall	207
Gould *v.* Evansville R. Co.	58
v. Hayden	104, 313
Gouldsmith *v.* Coleman	337
Gouldsworth *v.* Knights	363
Gove *v.* White	620, 716
Grace *v.* McKissack	561
v. Martin	78, 146
Grady *v.* Porter	555
Graham *v.* Boston R. Co.	186, 137, 217, 219, 304
v. Graham	402
v. Long	117, 204
v. Monsergh	274
v. Railroad Co.	102
Grand Tower Mining Co. *v.* Gill	346
Grand Trunk Ry. Co. *v.* Dyer	669
Granger *v.* Clark	306
v. Parker	526
Grant *v.* McLachlin	246
Grant *v.* Norway	475
v. Parham	450
v. White	512
Grantham *v.* Kennedy	117, 118
Grattan *v.* Metropolitan Ins. Co.	686
Gravenor *v.* Woodhouse	523, 531
Graves *v.* Colwell	365
v. Key	471, 472, 558, 560, 631, 714
v. Lake Shore R. Co.	574
Graw *v.* Bayard	666
Gray *v.* Agnew	617
v. Crockett	586, 599, 603
v. Dougherty	56
v. Gray	57, 453, 583
v. Hodge	54
v. Johnson	510
v. MacLean	374
v. McNeal	205
v. Wilson	68
Graybeal *v.* Davis	560
Great Falls Manuf. Co. *v.* Worster	214, 356, 375
Greaves *v.* Middlebrooks	698
Green's Appeal	365
Green *v.* Branton	117
v. Clarke	126
v. Glynn	153
v. Hamilton	78
v. Kemp	371
v. Lycoming Ins. Co.	598
v. Sarmiento	268, 272
v. Starr	103, 311
v. Van Buskirk	275
v. Walker	596, 598
v. Wardwell	499
v. Weaver	153
Greenabaum *v.* Elliott	76
Greenaway *v.* Adams	614
Green Bay Canal Co. *v.* Hewitt	179, 182, 359, 467, 612, 723
Greenby *v.* Wilcocks	522
Greencastle *v.* Black	692
Greene *v.* Greene	217
v. Smith	611, 620, 621
Greenfield Bank *v.* Crafts	485
v. Stowell	494, 565, 632
Greenup *v.* Crooks	706
Greenvault *v.* Davis	522
Greenville R. Co. *v.* Joyce	719
Gregg *v.* Von Phul	587
v. Wells	561, 584, 606, 665
Gregory *v.* Doidge	523, 526
v. Hobbs	182
v. Peoples	445
Gresham *v.* Ware	571
Grider *v.* Driver	665, 666
Gridley *v.* Hopkins	561
Griefswald, The	235, 251, 253
Griffeth *v.* Brown	631
Griffin *v.* Eaton	271
v. Lawrence	665, 666

	Page
Griffin v. Nichols	584
v. Rusdell	607
v. Seymour	53, 57
v. Wallace	153
Griffith v. Clarke	116, 204
Griggs v. Gibson	675
Grignon v. Astor	252, 286
Grim's Appeal	599, 602
Grimes v. Taft	458
Grimmet v. Henderson	146
Grissler v. Powers	651, 652
Grisson v. Reynolds	140
Grist v. Hodges	522
Griswold v. Haven	473, 565, 566
v. Hill	103
v. Seligman	563, 642
Grosholz v. Newman	345, 358
Groton Bank v. Batty	666
Grout v. Chamberlin	318
Groves v. Blondell	638
Grusenmeyer v. Logansport	66
Gudger v. Barnes	517
Guen v. Gouverneur	77
Guernsey v. Carver	194, 198
Guest v. Burlington Opera House Co.	638
Guffey v. O'Reiley	586, 699
Guichard v. Brande	638
Guild v. Thomas	566
Gulf R. Co. v. Gordon	638
Gunn v. Howell	140, 252, 281
Gurnsey v. Edwards	219
Guthrie v. Howard	117
v. Quinn	580
Gwinn v. Smith	345

H.

	Page
Hackett v. Callender	637
v. Ottawa	376, 469
Hadley v. State	545
Hager v. Burlington	617
v. Spect	143
Hagerman v. Ohio Bldg. Assoc.	463
Hagey v. Detweiler	621
Hahn v. Kelly	204
Hailey v. Boyd	146
Haines v. Dennett	480, 557
Hains v. Gardner	344
Haldeman v. United States	72
Hale v. Milwaukee Dock Co.	475, 623
v. People	290
v. Skinner	449, 571, 620, 716
Halifax Union v. Wheelwright	494
Hall v. Armor	149
v. Benner	530
v. Blake	141
v. Butler	524, 529
v. Callahan	598
v. Cavanaugh	629
Hall v. Fisher	587
v. Hamlin	215, 216
v. Jackson Co.	638
v. Levy	154, 188
v. Matthews	337
v. Odber	290, 309
v. Sigel	137
v. Stryker	150
v. Timmons	606
v. Williams	270, 274, 291, 292, 296, 300
v. Winchell	283
Halliday v. McDougall	299
Hallifax v. Lyle	497
Hallock v. Dominy	66
Halloran v. Whitcomb	620, 715
Hambleton v. Central Ohio R. Co.	639
v. Veere	171
Hamilton v. Cutts	521
v. Dutch East India Co.	261
v. Houghton	102
v. Marsden	530
v. Quimby	153
v. Zimmerman	571
Hamilton Hydr. Co. v. Cincinnati R. Co.	542
Hamlet v. Richardson	181
Hamlin v. Hamlin	713, 714
v. Sears	669
Hammerslough v. Cheatham	699
v. Kansas City Association	572, 573
Hammond v. Wilder	216, 306
Hamner v. Pounds	152
Hampton v. McConnel	270, 306
Hanchey v. Coskrey	53
Hancock v. Welsh	123
Haney v. Ray	394
Hanham v. Sherman	75, 76, 85, 186
Hanley v. Donoghue	206, 275, 276, 296, 306
v. Foley	97
Hanna v. Read	90, 95
Hannah v. Collins	395
Hannon v. Christopher	362, 363, 396
Hanrick v. Patrick	402, 403
Hanson v. Chiatovich	698, 699
Haralson v. George	200
Harbaugh v. Albertson	290, 722
Harbin v. Bell	684
Harden v. Darwin	339
Hardigree v. Mitchum	561
Hardin v. Palmerlee	200
Harding v. Hale	83
Hardman v. Willcock	551
Hardy v. Akerly	521
v. Chesapeake Bank	629, 631
v. Mills	152
v. Nelson	359
Harlow v. Marquette R. Co.	611
v. Pike	219

	Page
Harmon v. Auditor of Public Accounts	102, 136, 137
v. Birchard	140
Harness v. Green	273, 286
Harriman v. Gray	405
Harris v. Brooks	578
v. Hardeman	204
v. Harris	153
v. Kirkpatrick	638, 642
v. Mulkern	97, 165
v. Willis	205
Harrison v. Phœnix Ins. Co.	76
v. Rowan	212
v. Stewardson	136
v. Wilkin	567
Harshey v. Blackmarr	293, 305
Harshman v. Knox	103
Hart v. Bullion	573
v. Cummins	281
v. Giles	617
v. Gregg	395
v. McNamara	47, 223, 224
Harter v. Kernochan	376, 469
Hartman v. Ogborn	117, 216
Hartshorn v. Potroff	688
Hartung v. Witte	620
Harvey v. Farnie	244
v. Morris	547
v. Osborne	135
Haskell v. Putnam	519
Hass v. Plautz	620
Hassell v. Hamilton	280, 281
Hasselman v. U. S. Mortg. Co.	346, 466
Hastings v. Pepper	475
Hatch v. Bullock	506
v. Coddington	200
v. Kimball	715
v. Spofford	108, 311
Hatcher v. Dillard	230
Hatchett v. Berney	149
Hatfield v. Hatfield	229
Hathaway v. Noble	562
Hawes v. Shaw	521, 533
v. Watson	550, 647, 649
Hawkes v. Orton	522
v. Truesdell	51, 729
Hawkins v. Methodist Church	561, 639
Hawks v. Munger	565
Hawksford v. Giffard	290
Hawley v. Simons	84
v. Smith	71
Haws v. Tiernan	56
Hawthorne v. East Portland	684
Haxtun v. Sizer	374, 567
Haydock v. Coope	685
Hayes v. Livingston	713
v. Virginia Protection Assoc.	699
Haymond v. Camden	203
Hayne v. Maltby	368, 373
Haynes v. Ordway	187
v. Stevens	359, 412
Haynes v. Thomas	636
Hays v. Askew	382
v. Reger	595
Hazard v. Irwin	352
Hazen v. Reed	97
Healy v. Root	273
Heane v. Rogers	558, 559, 631, 714
Heard v. Hall	338, 713, 714
Heath v. Crealock	398, 408, 424, 428
v. Frackelton	100
v. Franklin Ins. Co.	662
v. Keyes	569
Heck v. Fisher	603
Hedgepeth v. Rose	666
Hefferman v. Porter	65
Hefner v. Dawson	581
v. New York Life Ins. Co.	75, 114
v. Vandolah	572, 638
Helena, The	42, 238
Helena v. Turner	466, 514
Hemenway v. Wood	152
Hemphill v. McKenna	86
Hendershot v. Henry	573, 608
Henderson v. Hartman	562
v. Henderson	153, 260
v. Price	685
Hendricks v. Kelly	617, 713
Hendrickson v. Hinckley	202
v. Norcross	100, 201
Henley v. Robb	338
Henrick & Maria, The	251, 253
Henry v. Gilliland	661, 672
Henry Co. v. Winnebago Drain Co.	685
Hentz v. Miller	562
Herbert v. Fera	51
Herbst v. Smith	67
Hern v. Nichols	501, 502, 504
Herrick v. Belknap	68
v. Malin	578
Hertzberg v. Beisenback	407
Hewett v. Currier	684, 719
Heyn v. O'Hagen	645
Hibshman v. Dulleban	154
Hickling v. Wilson	692
Hicks v. Cram	620
Hide & Leather Bank v. West	475
Higginbotham v. Cornwell	678
Higgins, Ex parte	107
Higgins v. Chicago	688
Hightower v. Overhaulser	692
Hilbourn v. Fogg	517, 520, 537
Hill v. Bain	114, 121
v. Den	332
v. Hill	571
v. Huckabee	54, 64, 460, 682, 722
v. Manchester	369
v. Minor	334
v. Moore	68
v. Morse	152, 153
v. Nisbet	684
v. Tucker	318

	Page
Hill *v.* West	340
Hillock *v.* Traders' Ins. Co.	611
Hills *v.* Laming	372, 375
v. Miller	608
v. Sherwood	151
Hinckley *v.* Greany	665
Hindson *v.* Weatherill	211, 212
Hine *v.* K. & D. R. Co.	114
Hirth *v.* Pfeifle	139
Hiss *v.* Baltimore Ry. Co.	636
Hitchcock *v.* Aicken	264, 267
v. Fortier	412
v. Galveston	467
v. Harrington	344
Hitchin *v.* Campbell	109, 200
Hitchman *v.* Waltman	544
Hobbs *v.* Duff	190
v. Henning	241
v. McLean	135
Hoboken *v.* Penn. R. Co.	360, 361, 395
Hockaday *v.* Skeggs	286
Hodges *v.* Latham	332
v. Powell	601
v. Spicer	597
Hodgson, In re	108
Holsall *v.* Stallebrasse	169, 171
Hoeger *v.* Chicago Ry. Co.	460, 471
Hoffmire *v.* Holcomb	685
Hogan *v.* Harley	533
Holbert, Estate of	51
Holbrook *v.* Debo	403
v. Tirrell	672
Holcomb *v.* Tift	104
Holdane *v.* Cold Spring	635
Holden *v.* Phelps	598
v. Putnam	583
Holland *v.* Anderson	627
v. Cruft	395, 440
v. Hatch	56, 60
Holloway *v.* Galliac	528
Holman *v.* Dukes	896
Holmes *v.* Remsen	314
v. Steele	666
v. Trumper	494, 632
v. Turner's Falls Co.	545
Holt *v.* Alloway	294, 302
v. Martin	540, 541
Home Ins. Co. *v.* Gamble	139
v. Sherwood	468
Homer *v.* Brown	54, 55
v. Fish	186, 217, 220, 393
Hone *v.* Henriques	685
Hood *v.* Hood	46, 49, 52, 87, 88, 227, 228, 254, 297, 307, 308
Hooker *v.* Hubbard	54, 168, 661, 681, 722
Hoover *v.* Kilander	581
Hopcraft *v.* Keys	517, 523
Hope *v.* Lawrence	667
Hopper *v.* McWhorter	591
Hoppin *v.* Hoppin	405, 449
Hopple *v.* Hipple	597
Horn *v.* Cole	374, 549, 561, 567, 629, 631, 650, 651
v. Lockhart	64
Hortman *v* Osgood	204
Horton *v.* Davis	684
v. Westminster Comm'rs	369
Hortsman *v.* Henshaw	483, 484, 485, 487
Hosford *v.* Johnson	570
Hosmer *v.* Wallace	67
Houlditch *v.* Donegal	258
Housatonic Bank *v.* Martin	351, 371, 375
House *v.* McCormick	391
Houston *v.* Blackman	476, 477
v. Matthews	622
v. Turk	340
Houstoun *v.* Sligo	84, 88, 100, 174, 179, 181, 702
Hovenden *v.* Annesley	536
Hovey *v.* Woodward	375
Howard *v.* Chase	371
v. Hudson	575, 638, 640
v. Massengale	672
Howard Co. *v.* Bullis	689
Howe Machine Co. *v.* Farrington	572
Howell *v.* Goodrich	187
v. Hale	339
Howes *v.* Austin	54
Hovland *v.* Woodruff	560, 595
Howlett *v.* Tarte	75, 186, 217, 220
Hoxie *v.* Finney	402
Hoyt *v.* Sprague	669
Hubbard *v.* Norton	359, 412
Hubert *v.* Fera	729
Hudgens *v.* Cameron	148
Hudson *v.* Guestier	252
v. Winslow	365
Huffer *v.* Allen	77, 86, 191
Hughes *v.* Alexander	76, 168
v. Cornelius	221, 229, 237, 238, 241, 248
v. Dundee Mortgage Co.	60
v. Edwards	536
v. United States	58
v. Wheeler	620
Hull *v.* Blake	315
v. Hull	638
v. Johnston	719
v. Pleasant Valley	686
Hull Flax & Cotton Mill Co. *v.* Wellesley	623
Humphreys *v.* Finch	562
v. Newman	407
Hundley *v.* Filbert	567
Hungerford's Appeal	153
Hungerford *v.* Cushing	207, 290
v. Moore	686
Hunt *v.* Blackburn	215, 219
v. Brown	177, 182, 186, 220
v. Cope	521

	Page
Hunt *v.* Haven	126
v. Hunt	244, 254, 302, 308
Hunter *v.* Davis	152
v. Heath	638
v. Prinsep	252
v. Sandy Hill	635, 668
Huntington *v.* Charlotte	204
v. Pritchard	345, 346
Hussman *v.* Wilke	509
Hutchinson *v.* Bank of Wheeling	114
Huzzard *v.* Nagle	132
Huzzey *v.* Hefferman	400
Hyatt *v.* Burlington Ry. Co.	719
Hyde *v.* Baldwin	332, 674
Hyde Park *v.* Borden	666

I.

Iberia *v.* Serrett	686
Idaho, The	548, 549
Ihmsen *v.* Ormsby	178
Illinois Ins. Co. *v.* Wolf	471
Illinois Masons' Soc. *v.* Baldwin	638
Imboden *v.* Etowah Mining Co.	460, 466
Imrie *v.* Castrique	39, 242, 262
Incledon *v.* Burges	95
Independent Order of Aid *v.* Paine	376
Indiana *v.* Helmer	278, 281
Ingham *v.* Ingham	678
Ingraham *v.* Baldwin	530
Inman *v.* Mead	150
Innis *v.* Lyman	435
v. Templeton	599
Ins. Co. *v.* Bruce	365, 376, 469
v. Eggleston	660, 661, 663, 664
v. Harris	268, 275, 698
v. Mowry	574, 576, 577, 661, 664
v. Norton	661
v. Schwenk	721
v. Wilkinson	664
v. Wolff	661, 662
Ins. Co. of Penn. *v.* Smith	471
International Bank *v.* Bowen	608
v. German Bank	578
Irby *v.* Kitchell	554
Iredell *v.* Barber	499
Iron Mountain Bank *v.* Armstrong	718
v. Murdock	494
Irvin *v.* Nashville Ry. Co.	582
Irvine *v.* Adams	597
v. McKeon	476, 477
v. Scott	566
Irving *v.* Excelsior Ins. Co.	721
Irving Bank *v.* Wetherald	490, 499
Irwin *v.* Wright	606
Ish *v.* Crane	684
Isquierdo *v.* Forbes	257
Iverson *v.* Saulsbury	603
Ives *v.* No. Canaan	669, 683
v. Sawyer	346, 357, 442, 443

J.

	Page
Jack *v.* D. & M. R. Co.	721
Jackson *v.* Allen	366, 558, 574
v. Ayres	527, 529, 547
v. Bradford	405, 486
v. Brinckerhoff	851
v. Brownell	511
v. Bull	401
v. Carver	360
v. Cuerden	532
v. Lawton	67
v. Marsh	133
v. Murray	401
v. Pixley	645
v. Randall	97, 165
v. Sinclair	362
v. Spear	532
v. Summerville	186, 215, 220
v. Thompson	372
v. Tiernan	318
v. Vanderheyden	339, 340
v. Walker	547
v. Wood	159, 285
Jacksonville R. Co. *v.* Cox	398
Jacobs *v.* Hill	146
v. Miller	674, 684
Jacocks *v.* Gilliam	488
James *v.* James	70
v. Patterson	547
v. Russell	565
v. Wilder	349
Jameson *v.* McCoy	58
Jamison *v.* Miller	644
Janeson *v.* Janeson	585
Jaqua *v.* Montgomery	581
Jarbor *v.* Smith	72
Jarrett *v.* Kennedy	611
Jarvis *v.* Aikens	432
Jasper *v.* Ballou	376, 469
Jay *v.* Carthage	55
Jeffers *v.* Philo	578
Jemison *v.* Cozens	354
Jenkins *v.* Harrison	202
v. International Bank	95, 100, 102, 376
v. Means	683
v. Robertson	73, 137
Jennison *v.* W. Springfield	183
Jessup *v.* Carnegie	63, 706
Jew *v.* Wood	523
Jewell *v.* Rock River Paper Co.	457, 565
Jochumsen *v.* Suffolk Bank	206
Johnson *v.* Farlow	143
v. Johnson	198
v. Northey	102
v. Owen	578
v. Pate	57
v. Provincial Ins. Co.	197
v. Pye	605
v. Riddle	152, 704

	Page
Johnson *v.* Robertson	136
v. Thompson	334, 371
v. Watts	442
Joliffe *v.* Baker	610
Jolliffe, Ex parte	245
Jolly *v.* Arbuthnot	363, 539, 540
Jones *v.* Ætna Ins. Co.	124
v. Bow	229
v. Burnham	553
v. Clark	683
v. Clouser	673
v. Congregation of Mt. Zion	719
v. Cowles	711
v. Darch	495
v. De Graffenreid	129
v. Dorr	639
v. Drewry	271, 272
v. Gallatin	873
v. Gerock	274, 275, 674
v. Gregory	211
v. Hawkins	203, 561
v. Jamison	313
v. Kearney	603
v. King	403
v. Long	131
v. McPhillips	54, 557, 722
v. Morris	332
v. Oswald	134
v. Powell	608
v. Reese	389, 399, 450, 544, 545
v. Richardson	201
v. Ritter	150, 205
v. St. Johns College	68
v. Scanland	498
v. Stanton	411
v. Underwood	55
v. Weatherbee	188
Jordaine *v.* Lashbrooke	480, 557
Jordan *v.* Faircloth	100
v. Money	574, 576
v. Phelps	76
Jourdan *v.* Jourdan	409
Journeay *v.* Gardner	672
Jourolmon *v.* Massengill	702
Jowers *v.* Phelps	561, 586
Joyce *v.* Williams	503, 621, 622
Justice *v.* Commonwealth	89

K.

	Page
Kaehler *v.* Dobberpuhl	718
Kane *v.* Bloodgood	536, 545
Kane County *v.* Herrington	600
Kanne *v.* Minneapolis Ry. Co.	53
Kansas Pac. Ry. Co. *v.* Dunmeyer	345
Kearney *v.* Dean	227
Keate *v.* Phillips	456, 557, 558, 599
Keater *v.* Hock	57
Keating *v.* Orne	578
Keeler *v.* Vantuyle	587
Keen *v.* Coleman	602, 604
v. Hartman	604
Keenan *v.* Missouri Ins. Co.	664
Keer *v.* Hitt	620
Keiffer *v.* Ehler	50
Keith *v.* Goodwin	562
v. Keith	346
Keller *v.* Equitable Ins. Co.	627
Kelley *v.* Donlin	100, 152
v. Mize	216
v. State	366
Kellogg *v.* Ely	691, 692
v. Smith	619
Kelly *v.* Dutch Church	134
v. Seward	395
v. Turner	339
Kelso's Appeal	671
Kemp *v.* Lyon	720
Kendal *v.* Talbot	53
Kendall *v.* Hamilton	107, 108
v. Titus	118, 465
Kenicott *v.* Supervisors	469
Kenn's Case	229
Kennedy *v.* Brown	372
v. Cassilis	244, 260
v. Georgia Bank	203
v. Redwine	203, 561, 721
Kennell *v.* Abbott	212
Kent *v.* Hudson River R. Co.	126
v. Quicksilver	669
Kepley *v.* People	332
Kepp *v.* Wiggett	366, 377
Ker *v.* Wauchope	675
Kerbourgh *v.* Vance	346
Kerr *v.* Kerr	244, 293, 296
v. Shaw	522
Kersall *v.* Marshall	262
Ketchum *v.* Duncan	638
v. Schickentanz	346, 357
Keyes *v.* Scanlan	661
Keyser *v.* Simmons	545, 686
Kidder *v.* Blaisdell	149, 336, 375
Kiefer *v.* Rogers	627
Kierlighett, The	253
Kile *v.* Yellowhead	688, 718
Kilgore *v.* Jordan	605
Killheffer *v.* Herr	198
Kille *v.* Ege	97, 165
Killen *v.* Marshall	148
Killoren *v.* Murtaugh	511
Killsa *v.* Lermond	139
Kimball *v.* Ætna Ins. Co.	577
v. Boston	689
v. Gay	141, 314
v. Kimball	844
v. Lee	693
Kimberley *v.* Ely	86, 690
Kimberly *v.* Patchin	446
Kimbro *v.* Hamilton	882
Kimmel *v.* Benna	129
Kincaid *v.* Donnell	620

	Page
King v. Boston	179
v. Chase	121, 123, 152, 158, 160
v. Dunn	162
v. Hoare	104, 106, 107, 108, 109
v. Norman	146, 150
v. Penn	114, 208, 290, 718
v. Rea	340, 397, 600
v. Reynolds	407
v. Van Gilder	322
Kingman v. Graham	584, 585, 594, 595, 627, 629, 631
Kingsbury v. Yniestra	296
Kingsley v. Davis	121, 124
Kingsman v. Kingsman	552
Kingston's Case, Duchess of	5, 47, 50, 91, 96, 114, 116, 152, 154, 157, 158, 159, 160, 209, 213, 219, 227, 229, 285, 384, 446, 558, 697, 698
Kinnear v. Lowell	408
v. Mackey	561, 608, 629
Kinnersley v. Orpe	95
Kinney v. Kiernan	674
v. Whiton	597, 629, 637, 650, 651
Kinnier v. Kinnier	244
Kinsman v. Loomis	346, 409
v. Parkhurst	553
Kip v. Brigham	182
Kipp v. Fullerton	207
Kirby v. Fitzgerald	73, 216
Kirchner v. Miller	620
Kirk v. Hamilton	715
Kirklan v. Brown	191
Kirkland v. Trott	95, 722
Kirkman v. Bank of Greensboro	598
Kirkpatrick v. Brown	718
Kist v. Atkinson	77
Kitchen v. Bartsch	497
Kitzmiller v. Rensselaer	335
Klein v. Caldwell	602, 604
Klenk v. Knobel	349, 459
Klinesmith v. Socwell	684
Knapp v. Abell	274, 286
v. Marlboro	132
Knibbs v. Hall	191
Knight v. New England Worsted Co.	198
v. Thayer	117, 340, 432
v. Wall	713, 714
Knights v. Wiffen	473, 549, 567, 639, 645, 646
Knott v. Cunningham	112
Knouff v. Thompson	595, 627
Knowles v. Gaslight Co.	206, 296, 705
Knowlton v. Hanbury	58
Knox v. Clifford	563
v. Higginbotham	450
v. Sterling	134
v. Waldoborough	55
Knox Co. v. Aspinwall	469
v. Wallace	469
Koons v. Davis	492, 581, 612
Kortz v. Carpenter	522
Kothman v. Markson	684
Kraft v. Baxter	569
Kramph v. Hatz	134
Kraus v. Thompson	136
Krekel v. Kreichbaum	684
Krekeler v. Ritter	699
Kronprinz v. Kronprinz	53, 58, 72, 73
Kuhl v. Jersey City	473, 629
Kunzie v. Wixom	673

L.

Lackland v. Stevenson	683
Lackman v. Wood	605
Lacy v. Johnson	547
Ladd v. Durkin	148
v. Putnam	60
Ladrick v. Briggs	569
Lainson v. Tremere	361, 366, 367, 368, 369, 397
Lake v. Graham	376, 467, 469
Lake Shore Ry. Co. v. State	85
Lall v. Pershad	61
Lamb v. Gatlin	74, 102
v. Trowbridge	557
v. Walker	171, 172
Lampon v. Corke	330
Lamprey v. Nudd	119
Lamson v. Clarkson	517
Lancaster's Appeal	280
Land Co. v. Saunders	341
Landis v. Hamilton	114, 127
Landon v. Litchfield	669, 683
Lane v. Degberg	226
v. Miller	666
Lang v. Holbrook	243
Langan v. Sankey	459, 574
Langdon v. Doud	574, 575
Langford v. Selmes	391, 394
Langmead v. Maple	58, 704
Langton v. Lazarus	487
Langworthy v. Baker	205
Lanigan v. New York	69
Lansing v. Gaine	503
v. Van Alstyne	522
Lantz v. Maffett	131, 203
Lapham v. Briggs	296, 313
Lapping v. Duffy	472
Larkin v. Mead	562
Larkins v. Mason	146
Latham v. Edgerton	207
Lathrop v. Kneeland	563
Latine v. Clements	318
Latiolais v. Citizens' Bank	466
Laub v. Trowbridge	638, 644
Laughlin v. Mitchell	571
Laughton v. Atkins	245
Laverty v. Burr	503
v. Moore	620

	Page
Lawes v. Purser	553
Lawrence v. Ballou	717
v. Berney	102
v. Englesby	230, 231
v. Fox	371
v. Gaultney	321
v. Hunt	88, 128, 152, 285
v. Jarvis	293, 296
v. Luhr	587
v. Milwaukee	52
v. Stratton	672
v. Towle	638
v. Vernon	109
v. Webster	346
Lawrence Univ. v. Smith	578
Lazell v. Miller	191
Lazier v. Westcott	265
Lea v. Lea	51, 729
Leach v. Buchanan	482, 492
Learned v. Bryant	567
Leary v. New	544
Leather Manuf. Bank v. Morgan	584, 585, 588, 596, 611, 612, 629, 632, 639, 645, 646, 650
Leavitt v. Putnam	505
v. Wolcott	102
Le Chevelier v. Lynch	314
Lechmere v. Fletcher	105, 106
Lee v. Clark	133, 372
v. Dolan	69
v. Gardiner	685
v. Hopkins	91
v. Lake	669, 715
v. Monroe	557
v. Mound Station	668
v. State	130
v. Templeton	673
v. Tillotson	689
v. Turner	338
v. West	112
Leeper v. Hersman	629
Legge v. Edmonds	131
Leggett v. Great Northern Ry. Co.	131
Lehman v. Bradley	147
v. Clark	54, 673, 719, 722
v. Warner	373, 463, 464
Leinkauff v. Munter	101, 135
Leland v. Marsh	172
Lemmon v. Hartsook	620
Leonard v. Baker	60
v. Simpson	78, 131
v. Whitney	152
Lesher v. Sherwin	547
Lesterjette v. Ford	299
Leutz v. Wallace	160
Levering v. Shockey	479, 603
Levi v. New Orleans Ins. Assoc.	223
Levy v. Gray	603
v. Hale	644
Lewis v. Alexander	587
v. Allred	205
Lewis v. Board of Commissioners	75
v. Champion	670
v. Lanphere	561
v. Lewis	212
v. Meserve	344
v. Rogers	217
v. Webber	567
v. Willis	509
Lexington R. Co. v. Elwell	693
Libbey v. Pierce	375, 505, 572
Lichtenberger v. Graham	607
Light v. St. Louis Ry. Co.	684
Lilley v. Adams	673
Lincoln v. Tower	290, 296, 301
Lindell v. McLaughlin	622
Lindner v. Brock	549, 567
Lindsey v. Danville	94
v. Hawes	341
Linington v. Strong	59
Linney v. Wood	352
Lippmins v. McCranie	561
Lipscomb v. Postell	182
Litchfield v. Cudworth	232
v. Goodnow	101, 114, 223, 348
Lites v. Addison	574, 581
Lithgow v. Kavenagh	340, 449
Littlefield v. Brown	679
v. Perry	446
Littleton v. Clayton	511, 514, 520
v. Richardson	133
Livermore v. Aldrich	478
Liverpool Assoc. v. Fairhurst	604
Liverpool Bank v. Walker	108
Liverpool Credit Co. v. Hunter	255, 263
Liverpool Whf. Co. v. Prescott	618
Livington v. Hastle	503
Lloid v. Maddox	229
Lloyd v. Barr	68, 101
v. Lloyd	424
Loan Association v. Topeka	693
Lobdell v. Baker	610
Lochte v. Gélé	564, 565
Locke v. White	408
Lockett v. James	449
Lockhart v. Locke	252
Lockyer v. Ferryman	188
Loeb v. Willis	56, 60, 61
Loftus v. Maw	574
Logan Co. v. Lincoln	461
Logansport v. Humphreys	72, 99
v. La Rose	66, 68, 627, 692
v. Uhl	666, 688
Lomax v. Smyth	577
Lomerson v. Hoffman	140
London & Northern Ins. Co., In re	624
London & Northwestern R. Co. v. West	514, 538
London Ry. Co. v. Lindsay	301
Long v. Anderson	629
v. Bullard	683
v. Fox	717

	Page
Long *v.* Wilkinson	346
Longfellow *v.* Moore	661
Long Island R. Co. *v.* Conklin	407
Loomis *v.* Pingree	405
v. Pulver	77
Lorain *v.* Hall	360
Lord *v.* Lord	678
v. Wilcox	131
Lorentz *v.* Lorentz	638, 669
Loring *v.* Folger	140
v. Mansfield	76
v. Otis	370
v. Steineman	230, 232
Los Angeles *v.* Mellus	57
Lot *v.* Thomas	359, 412
Lothian *v.* Henderson	46, 237, 241
Lothrop *v.* Foster	448
Loud *v.* Loud	245
Loudenback *v.* Collins	59
Louis *v.* Brown	102
Louisiana Levee Co. *v.* State	114
Louisville R. Co. *v.* Flanagan	467
Louks *v.* Kenniston	611, 620
Love *v.* Gibson	132
v. Law	511
v. Trueman	59
Lovejoy *v.* Murray	112, 127
Loveman *v.* Taylor	552, 684
Low *v.* Bartlett	318, 319
v. Mussey	286
Lowell *v.* Daniels	339, 599, 600
Lowry *v.* Inman	137
v. Lumberman's Bank	138
Lucas *v.* Bank of Darien	302
v. Beebe	365
v. Brooks	511, 527
v. Greenville Assoc.	466
v. San Francisco	72
Luce *v.* Dexter	112
Luckenback *v.* Anderson	52, 304, 307
Lucy *v.* Gray	375, 572
Lufkin *v.* Curtis	340, 449
Lumber Co. *v.* Buchtel	188
Lund *v* Seaman's Bank	548, 549
Lunsford *v.* Alexander	514
Lunt *v.* Holland	370
Luntz *v.* Greve	79
Lush, In re	603
Lyman *v.* Faris	125, 137
Lynch *v.* Swanton	100
Lyon *v.* Northrup	132
v. Perin Manuf. Co.	58
v. Reed	699
v. Robbins	85
v. Stanford	119, 121
v. Travellers' Ins. Co.	664, 717
Lyons *v.* Munson	376, 469

M.

	Page
McAbe *v.* Thompson	638
McAdams *v.* Hawes	629
McAfee *v.* Fisher	580, 582
McAfferty *v.* Conover	715
McAleer *v.* Horsey	582
McAllister *v.* Brooks	138
McArthur *v.* Home Life Assoc.	684
McAuly *v.* West Vt. Ry.	672
McBee *v.* Fulton	116
McBeth *v.* Trabue	605
McBlair *v.* Gibbes	558
McBridge *v.* Greenwood	402
McBroom *v.* Lebanon	466
McCabe *v.* Raney	581
McCaffrey *v.* Carter	197
McCall *v.* Carpenter	277, 287
v. Coover	387
v. Jones	53, 87
v. Powell	639
McCalley *v.* Robinson	152, 704
v. Wilburn	77
McCance *v.* London & Northwestern Ry. Co.	638, 641
McCann *v.* Atherton	629
McCarthy *v.* Lavasche	463, 687
v. Mann	482
McClure *v.* Commonwealth	460, 552, 684
v. Englehardt	346
v. Lewis	669
v. Livermore	638
v. Oxford	468
McConihe *v.* Fales	357
McConnel *v.* Kibbe	172
McConnell *v.* Bowdry	527, 529
McCoon *v.* Smith	600, 605
McCormick *v.* Baltimore	635
v. Barnum	621
v. Bauer	101
v. Penna. Cent. R. Co.	135, 720
v. Sullivant	203, 206
McCoy *v.* McCoy	99, 203
McCramer *v.* Thompson	494
McCraw *v.* Old North Ins. Co.	663, 664
McCrea *v.* Purmort	383, 476, 477
McCreary *v.* Parsons	457
McCreery *v.* Fuller	73
McCrory *v.* Parks	101
McCullough *v.* Clark	79
v. Dashiell	365, 366
v. Wilson	604
McCune *v.* McMichael	715
McCusker *v.* McEvey	432, 441
McDaniel *v.* Hughes	314
McDonald *v.* Gregory	114
v. Lusk	374
v. McDonald	555
v. Mobile Ins. Co.	100, 152
v. Muscatine Bank	494
McDonnell *v.* Alabama Ins. Co.	467

	Page
McDowell v. Graham	712
v. Langdon	61
v. Peyton	212
McElmoyle v. Cohen	58, 271, 278, 284, 288
McEwen v. Jenks	571
McFarlane v. Cushman	56
McFeely v. Scott	217, 219
McGee v. Prouty	562
McGilvray v. Avery	108, 311
McGirr v. Sell	572
MacGregor v. Rhodes	483
McIntosh v. Parker	349
Mackintosh v. Smith	156
McIntire v. Yates	611
McKay v. Kilburn	126
McKee v. Monterey Co.	545, 686
McKellar v. Bowell	146
McKelway v. Armour	620
McKenzie v. British Linen Co.	584, 596, 632
McKleroy v. Southern Bank	481, 491
McKnight v. Dunlop	198
v. Pittsburgh	558
McLain v. Buliner	621, 670
McLaughlin v. Citizens' Bldg. Assoc.	464
v. Doane	56
v. McGee	60, 129
McLean v. Dow	666
v. Meek	149, 318
v. State	685
McLeery v. McLeery	339, 398, 448
McLendon v. Dodge	281
McMahon v. Merrick	114
McMasters v. Ins. Co.	571, 629, 638, 640
McMath v. Teel	546
McMicken v. Cincinnati	68
v. Perin	553
McMorris v. Webb	600, 602
McMullin v. Glass	479
McNairy v. Nashville	58
McNamara v. Arthur	59
McNamee v. Moorland	132
McNeil v. Hill	474
v. Tenth Natl. Bank	561
Macknet v. Macknet	683
McNutt v. Trogden	189
McPherson v. Foster	467
McQueen's Appeal	719
McQueen v. McQueen	64
McRae v. Mattoon	216, 303
McReynolds v. Jones	684
McStea v. Matthews	561
McWilliams v. Nisly	440
v. Ramsay	555
Maddison v. Alderson	574, 576
Madison Co. v. Paxton	611
Magee v. Hallett	341
Maghee v. Collins	168
Magnus v. Sleeper	80
Magoun v. New England Ins. Co.	47, 224, 226, 241, 254
Magrath v. Hardy	139
Magruder v. Esmay	397
Mahurin v. Bickford	320
v. Harding	610
Maigley v. Hauer	477
Mailhouse v. Inloes	78
Major v. Rice	621
Majors v. Cowell	130
Males v. Lowenstein	68
Maley v. Shattuck	247, 248
Malin v. Malin	587
Mallett v. Foxcroft	178
Malley v. Thalheimer	666
Malloney v. Horan	449
Mally v. Mally	153
Man v. Drexel	97, 165
Manhattan Ins. Co. v. Broughton	55
Manigault v. Deas	148
Mankin v. Chandler	234
Manny v. Harris	88
Mansfield v. Hoagland	131
Mansur v. Haughey	577, 636
Manufacturers' Bank v. Hazard	631
Manuf. Co. v. Elizabeth	365
v. Montgomery	466
Maple v. Railroad Co.	121, 123
Maquoketa v. Willey	683
Marble v. Keyes	194
Marco v. Fond du Lac Co.	471, 473
Marcy v. Oswego	469
Marine Bank v. Fiske	597
Marine Ins. Co. v. Hodgson	202
Mariner v. Milwaukee & St. Paul R. Co.	716
Marion Bank v. Dunkin	464, 466
Marion Road Co. v. McClure	617
Markham v. Middleton	167
v. O'Connor	595
Markland Co. v. Kimmel	584
Marlborough v. Sisson	194
Marquart v. Bradford	585
Marquette R. Co. v. Marcott	720
Marqueze v. Fernhadez	638
Marriot v. Marriot	212
Marriott v. Hampton	77, 91, 181, 191
Marsh v. Harris Manuf. Co.	553
v. Pier	84
v. Thompson	357, 545
Marshall v. Fisher	118
v. Pierce	714
v. Shafter	129
Marston v. Hobbs	389
v. Swett	553
Martel v. East St. Louis	461
Martin v. Jersey City Ins. Co.	661
v. Kennedy	110
v. Nichols	259, 260, 303
v. Talley	146
v. Walker	100

	Page
Martin v. Webb	565
v. Zellerbach	569
Marvin v. Dutcher	152
Mary, The	46, 47, 252
Mason v. Anthony	558
v. Eldred	107
v. Finch	683
v. Harper's Ferry Bridge Co.	569, 572, 574, 578
v. Mason	349, 672
v. Messenger	216
v. Patterson	78
v. Philbrook	594
Masser v. Strickland	146
Massey v. Bldg. Assoc.	464
Massie v. Sebastian	340
Masterson v. Matthews	63
Matheney v. Mason	549
Mather v. Maidstone	490
Mathes v. Cover	143
Matthews v. Houghton	138
v. Matthews	70
Matthey v. Wiseman	140
Mattill v. Baas	449
Mattison v. Aussmuss	358
Mattock v. Lee	450
Mattoon v. Clapp	271, 284
v. Young	572
Mattox v. Hightshue	117
Maury v. Coleman	581
Maxwell v. Bay City Bridge Co.	578, 584, 638, 666, 671
v. Stewart	275
May, In re	55, 84, 166, 188, 191
May v. Gates	570
v. Marks	99
Mayenborg v. Haynes	597, 630, 650
Mayer v. Erhardt	561
v. Ramsey	627, 699
Mayfield v. Wadsley	198
Mayo v. Ah Loy	206
v. Cartwright	594
v. Leggett	561
v. Wood	143
Mayor v. Lord	201
v. Pyne	198
Mays v. Stoneum	63
Mead v. Bunn	627
v. Figh	567
v. Keeler	687
v. Mitchell	79
Meadows v. Duchess of Kingston	209, 212, 219
Meads v. Merchants' Bank of Albany	500, 504
Means v. Hicks	145
Mecca, The	49, 251, 253, 301
Meddowcroft v. Huguenin	213, 219, 227, 229
Meens v. Thellusson	302
Megargel v. Megargel	471
Megee v. Beirne	50, 60, 234
Meily v. Butler	603
Meiss v. Gill	698
Meister v. Birney	630, 645
Meley v. Collins	688
Melick v. First National Bank	186
Melms v. Werdehoff	562
Meltzer v. Doll	51, 114
Meluish v. Milton	212
Menasha v. Hazard	376, 469
Menaugh v. Chandler	373
Mendenhall v. Mendenhall	674
Menlove v. Oakes	298
Mercer County v. Hacket	469
Merchants' Bank v. Chandler	137
v. National Bank	490
v. State Bank	468, 500, 501
Merchants' Ins. Co. v. De Wolf	287
Merchants of the Staple v. Bank of England	457, 494, 654, 656, 658
Mercier v. Chace	203, 206
Meredith v. Santa Clara Assoc.	88
Meriam v. Rundlett	138, 316
Merrells v. Phelps	591
Merriam v. Boston R. Co.	340, 349, 351, 599
v. Cunningham	605
v. Hassam	545
v. Merriam	60
v. Sewall	232
Merrick's Estate	675
Merrill v. Welsher	578
Merritt v. Campbell	56
v. Harris	395, 403
v. Horne	606
Merryman v. Bourne	358
Mervin v. Kumbel	299
Messina v. Petrococchino	263
Metropolitan Ry. Co. v. Chicago R. Co.	693
Metters v. Brown	131, 337
Mey v. Gullman	58
Meyer v. Clark	673
v. Mitchell	694
v. Muscatine	470
v. Ralli	263
v. Wiltshire	460
Michell v. Ingram	374
Michigan v. Phœnix Bank	220
Michigan Central R. Co. v. Phillips	475
Michigan Panelling Co. v. Parsell	578, 587, 638
Michigan Ry. Co. v. Mellen	684
Middlesex Bank v. Beltman	264
Middleton's Case	131
Midland R. Co. v. Hitchcock	611
Mihills Manuf. Co. v. Camp	597
Mildway v. Smith	558, 643
Miles v. Caldwell	128
v. Furber	564
v. Lefi	562

	Page
Miles *v.* Lingerman	600, 601
Milford *v.* Holbrook	132
Millard *v.* McMullin	334
Miller's Appeal	587, 617
Miller *v.* Brooklyn Ins. Co.	471
v. Brown	666, 669
v. Cook	72, 99
v. Covert	194
v. Eagle Ins. Co.	662
v. Ewing	404, 405
v. Goodwin	476, 478
v. Lang	511, 520, 533
v. McBrier	527, 530
v. Manice	84, 187
v. Miller	301, 683
v. Moses	880
v. Noble	79
v. Phœnix Ins. Co.	664
v. Shocklefor	347
v. Sullivan	473
v. White	137
v. Wilkins	571
Millisent *v.* Millisent	229
Mills *v.* Catlin	403
v. Duryee	267, 268, 270, 271, 290
v. Graves	713
v. Martin	207
Milne *v.* Van Buskirk	280, 281, 305
Minet *v.* Gibson	485
Minneapolis Assoc. *v.* Canfield	80
Minor *v.* Walter	78, 199
Minot *v.* Sawyer	60
Miranville *v.* Silverthorn	587
Mitchel *v.* Barry	357, 546
Mitchell *v.* Cook	56
v. Darley Colliery Co.	154, 169
v. Horton	684, 689
v. Ingram	597
v. Kintzer	215
v. Lipe	544
v. Ostrom	564
v. Reed	650, 651
v. Sanford	77
Mix *v.* People	365
Mobile *v.* Kimball	59
Mobile Ry. Co. *v.* Wilkinson	476, 479
Moffat *v.* Strong	454, 508, 509
Moffett *v.* Bates	678
Mohr *v.* Marks	718
Mojarrieta *v.* Saentz	578
Monarque *v.* Monarque	70
Mondel *v.* Steele	179, 180, 181
Monin *v.* Beroujon	555
Monks *v.* Belden	633
Monroe *v.* Douglas	247, 264
v. Luke	718
Monson *v* Tripp	597
Montague *v.* Weil	561
Montgomery's Case	362
Montgomery *v.* Clark	245
v. Gordon	605
Montgomery *v.* Keppel	631
v. Montgomery Plank Road Co.	466
v. Wasem	206, 665
Mookerjee *v.* Deb	607
Moore *v.* Beasley	510
v. Boyd	597
v. Byrum	446
v. Frazer	712
v. Metropolitan Bank	561, 562
v. Spiegel	51, 629
v. Toppan	204
v. Willis	428
Moores *v.* Citizens' Bank	499
Moors *v.* Albro	578
Moran *v.* Miami County	469
Morgan, Ex parte	101
Morgan *v.* Bliss	55
v. Burr	87, 99, 152
v. Chester	112, 122
v. Elam	578
v. Larned	542
v. Moore	870
v. Muldoon	36, 131, 132, 133
v. Railroad Co.	585, 587, 636
v. Rowlands	168
v. Spangler	597, 650
v. Vaughan	719
Morin *v.* St. Paul Ry. Co.	232
Morrell *v.* Morgan	53, 57
Morris *v.* Bethell	491
v. Hall	684
v. Rexford	673
v. Shannon	561
v. State	460, 686, 687
v. Webber	229
Morris Co. *v.* Hinchman	137
Morris R. Co. *v.* Railroad Co.	467
Morrison *v.* Bassett	509, 511
v. Bowman	674
v. New Bedford Inst. for Savings	140
v. Wilson	100
Morriss *v.* Garland	718
Morse *v.* Byam	571
v. Curtis	441
v. Dearborn	610, 611
v. Elms	95, 152, 160
v. Goddard	520, 522
v. Goold	63
v. Lowell	86, 690
v. Presby	203, 204, 205
v. Tappan	116
Morton *v.* Hodgdon	637
v. Noble	449
v. Sweetser	56
v. Woods	362, 363, 539, 540
Mosely *v.* Hunter	409
Moses *v.* McClain	349
v. McFerlan	191
v. St. Louis Dock Co.	598
v. Sanford	666

	Page
Moshier v. Frost	673
Moss v. McCullough	137, 147
v. Oakley	137
v. Sallimore	543, 544
Motley v. Harris	84
Mott v. Consumers' Ice Co.	719
Motz v. Detroit	465, 689, 692
Moulton v. Reid	130
v. Trask	194
Moultrie v. Savings Bank	469
Mount Morris Square, In re	68
Mountnoy v. Collier	538
Mowatt v. Castle Steel Co.	143, 453, 597
Mowrey v. Walsh	561
Moyer v. Lobengeir	140
Mueller v. Henning	99, 100
Muhlenberg v. Druckenmiller	377
Mull v. Orme	67
Muller v. Pondir	629
Mulligan v. Smith	36, 204
Mumford v. Stocker	103
Muncey v. Joest	206
Munford v. Overseers	146
v. Pearce	857
Munson v. Munson	286
Murdock v. Chapman	370
v. Gaskill	58
Murphy v. Barnett	442
v. People's Ins. Co.	638
Murray v. Blatchford	599
v. Jones	582, 685
Murrell v. Smith	152
Muse v. Dantzler	581
Mussey v. Eagle Bank	500
Mutual Ben. Ins. Co. v. Elizabeth	469
Mutual Ins. Co. v. Norris	611, 629, 640
Myers v. Beeman	50
v. Cronk	507
v. O'Hanlon	213
v. Uhrich	140

N.

	Page
Naglee v. Ingersoll	379
Napton v. Leaton	296
Nashua Ins. Co. v. Moore	464
Nashville Ry. Co. v. United States	73
Nason v. Allen	344
Nass v. Vanswearingen	587
Nathans v. Hope	85, 194
National Bank v. Bangs	481, 490, 491, 492
v. Case	563
National Ins. Co. v. Bowman	464
Nations v. Johnson	286
Neale v. Jeter	104
Needham v. Bremner	228
Neff v. Bates	636
Neill v. Devonshire	30, 114, 284
Nellis v. Lathrop	519
Nelson v. Boynton	230
v. Cowing	563
v. Oldfield	245
v. Woodruff	475
Nemetty v. Naylor	78, 127
Neusbaum v. Keim	78
Nevett v. Berry	374
Neville v. Hancock	109, 111
New Bedford v. Hingham	664, 665
Newbery v. Fox	461
Newbigging v. Adam	616
Newcomb v. Presbrey	407
Newell v. Holton	480, 557
v. Nixon	564
New England Ins. Co. v. Dunham	223
New Haven v. Fairhaven & W. R. Co.	585
New Haven R. Co. v. Chatham	461
Newington v. Levy	85, 188, 202
New Jersey Franklinite Co. v. Ames	136
Newlands v. National Employers' Accident Assoc.	566
Newman v. Waterman	280
Newnham v. Stevenson	683
New Orleans R. Co. v. Jones	671
Newport Bridge Co. v. Douglass	340
New Providence v. Halsey	469
Newton v. Egmont	137
v. Marshall	331
v. Walters	139
New York v. Sonneborn	552, 684
New York Ins. Co. v. Clemmitt	72, 99
New York Rubber Co. v. Rothery	586, 595, 596
New Zealand Banking Corporation, In re	623
Nichol v. Alexander	435
v. Mason	313
Nicholas v. Austin	586
Nichols v. James	564
v. Pool	561
Nicholson v. Caress	340, 402
Nickells v. Atherstone	525
Nickels v. Hancock	69
Nicodemus v. East Saginaw	692
Nieto v. Carpenter	341
Nims v. Sherman	506, 511, 713
Nispel v. Laparle	57
Nitche v. Earle	717
Niven v. Belknap	585, 606, 665
Nix v. Collins	713
Nixon v. Halley	603
Noble v. Blount	699
v. Chrisman	620
v. Cope	378
v. Gold	268
Noe v. Splivalo	332, 674
Noel v. Bewley	440
v. Kirney	599, 603
Noell v. Wells	210, 229
Noonan v. Ilsley	435

	Page
Norridgewock *v.* Madison	664
Norris *v.* Hall	138
v. Norton	353
v. State	373
v. Wait	605
North *v.* Henneberry	352
v. Mudge	73
North Bank *v.* Brown	313
Northern Bank *v.* Porter	376, 467, 468, 469
Northern Packet Co. *v.* Platt	638
Northwestern Packet Co. *v.* Shaw	467
Norton *v.* Coons	573
v. Doherty	83
v. Huxley	82
v. Norton	359, 683
Norwood *v.* Kirby	164, 511, 514
Noton *v.* Brooks	553
Nougué *v.* Clapp	219, 304
Nourse *v.* Nourse	349
Nouvion *v.* Freeman	288, 262, 285, 309, 705
Novelli *v.* Rossi	262

O.

Oakland Paving Co. *v.* Rier	460, 468
O'Beirne *v.* Lloyd	194
O'Brien *v.* Wetherell	545, 546
Obicini *v.* Bligh	262, 309
Ocean Bank *v.* Olcott	802
Ocean Ins. Co. *v.* Francis	48, 241
Ochsenbein *v.* Papelier	254, 307
O'Connell *v.* McNamara	102
O'Connor *v.* Varney	186, 187
Oddie *v.* National Bank	492, 493
O'Dell *v.* Little	603
O'Donnell *v.* Clinton	629
O'Dougherty *v.* Remington Paper Co.	194
Offley *v.* Ormes	507
Ogden *v.* Rowley	722
Ogdensburgh R. Co. *v.* Vermont R. Co.	719
Ogle *v.* Atkinson	541, 550
v. Smith	642
Oglesby Coal Co. *v.* Pasco	603
O'Halloran *v.* Fitzgerald	545
Ohning *v.* Evansville	146
Olcott *v.* Little	108
Oldham *v.* Ledbetter	140
O'Linda *v.* Lothrop	370
Oliver *v.* Holt	194
Olney *v.* Sawyer	346
O'Mulcahey *v.* Holley	584
O'Neal *v.* Brown	194
Ontario *v.* Hill	376, 469
Oregonian Ry. Co. *v.* Oregon Ry. Co.	459, 464, 465, 466, 476, 615, 685, 707
Organ *v.* Stewart	639
Orleans *v.* Platt	115, 376, 469
Ormes *v.* Dauchy	721
Ormond *v.* Moye	50
Osborn *v.* Elder	566
Osgood *v.* Abbott	336
v. Nichols	548
Osterhout *v.* Shoemaker	345, 358, 442
Otis *v.* McMillan	513, 533
v. Sill	587
Otterson *v.* Middleton	215
Outram *v.* Morewood	98, 729
Over *v.* Schiffling	564
Overseers *v.* Overseers	511
Overton *v.* Banister	606
v. Harvey	725
Owen *v.* Robbins	346
v. Slatter	588
Oxborough *v.* Borsser	68

P.

Packet Co. *v.* Sickles	38, 87
Padbury *v.* Clark	676
Padfield *v.* Pierce	685
Page *v.* Butler	374
v. Kinsman	510, 511
v. Smith	360
Page Co. *v.* B. & M. R. Co.	689
Paige *v.* Sherman	478
Painter *v.* Hogue	100
Palmer *v.* Bowker	538
v. Ekins	507
v. Meiners	638
v. Smith	685
v. Temple	725
v. Williams	578
Pancoast *v.* Travelers' Ins. Co.	466, 544
Pardon *v.* Dwire	203
Pargeter *v.* Harris	362, 363, 539, 540
Parham *v.* Randolph	627
Parish *v.* Parish	206
Parker *v.* Banks	597
v. Barker	598
v. Bennett	370
v. Crittenden	608
v. Judges	202
v. Manning	342
v. Moore	131, 135, 629
v. Smith	370
v. Thompson	38
Parkes *v.* Clift	153
Parkhurst *v.* Burdell	102
v. Van Courtland	587
Parkinson *v.* Sherman	371
Parnell *v.* Hahn	127, 153, 154
Partridge *v.* Bere	544
v. Kingman	564
v. Messer	352
Pasley *v.* Freeman	557, 578, 614, 629

	Page
Patch *v.* Ward	214, 306
Pate *v.* Harper	642
v. Turner	514
Patrick *v.* Jones	639
Patterson *v.* Baumer	692
v. Fraser	117
v. Hansel	527
v. Lawrence	339, 603
v. Read	684
Paul *v.* Squibb	617
v. Witman	134
Pausch *v.* Guerrard	577
Pawling *v.* Bird	264, 267
Payment *v.* Church	611
Payne *v.* Burnham	558, 652
v. O'Shea	214
v. Payne	165
Peake *v.* Thomas	629
Pearce *v.* Olney	202, 273, 304, 305
Pearl *v.* Harris	68
Pease *v.* Whitten	68
Peaslee *v.* Robbins	498
Peck *v.* Vandenberg	471
v. Woodbridge	217
Peebles *v.* Pate	114
Peek *v.* Gurney	579, 606, 650, 651
Peery *v.* Hall	570
Pells *v.* Webquish	349
Pelletreau *v.* Jackson	362
Pence *v.* Arbuckle	561, 597, 629, 631
Pendleton *v.* Dalton	59, 202, 722
v. Dyett	521
Pendley *v.* Madison	346
Pennington *v.* Gibson	286
Pennoyer *v.* Neff	49, 206
Penobscot R. Co. *v.* Weeks	203, 206
Penrose *v.* Curren	602
v. Griffith	341, 397
People *v.* Baker	244
v. Bank of North America	596, 632, 640
v. Brown	341, 569
v. Dawell	244
v. Goodwin	691
v. Hall	130
v. Johnson	152, 164
v. Judges of Monroe Co.	132
v. Murray	130, 689
v. New York	694
v. Phœnix Bank	214
v. Plumpke	620
v. Reeder	473
v. Sherman	290
v. Schuyler	69
v. Sterling Manuf. Co.	687
v. Stockton R. Co.	719, 720
v. Townsend	214
v. Waite	687
v. White	498
People's Bank *v.* Hodgdon	79
Peoria R. Co. *v.* Thompson	467
Pepper *v.* Zahnsinger	504
Perdue *v.* Brooks	460
Perkins *v.* Conant	562
v. Gay	619, 620, 621
v. Hart	198
v. Jones	722
v. Moore	57
v. Parker	56, 61, 84, 85
v. Walker	88, 160, 164, 703
Perrine *v.* Serrell	184
Perry *v.* Cheboygan	698
v. Dow	596
v. Harrington	198
v. Meddowcroft	213, 219, 227, 229
v. Williams	567
Perryman *v.* Greenville	545, 548, 686, 687, 690
Pershing *v.* Canfield	547
Pervear *v.* Kimball	121, 122
Peters *v.* Bowman	357
v. Sanford	107
v. Warren Ins. Co.	240
Petersine *v.* Thomas	153
Petrie *v.* Nuttall	114, 115
Petring *v.* Chrisler	710
Pettis *v.* Johnson	117
Peyton *v.* Stith	534
Pfiffner *v.* Krapfel	52, 307
Phelan *v.* Moss	494
v. Tyler	79
Phelps *v.* Harris	53, 58
v. Illinois Cent. R. Co.	572
v. White	610
Philadelphia *v.* Matchett	562
Philadelphia R. Co. *v.* Howard	722
Philbrick *v.* Shaw	332
Philips *v.* Bury	229
Phillipps *v.* Van Shack	699
Phillips *v.* Berick	88, 194, 702
v. Gallant	629
v. Godfrey	282
v. Hunter	258, 314
v. Rogers	684
v. Thurn	485, 489, 490
v. Ward	109
Phillpotts *v.* Blasdell	129
Phinney *v.* Johnson	627
Phœnix Ins. Co. *v.* Doster	661, 664
Phœnix Warehouse Co. *v.* Badger	464
Phosphate Sewage Co. *v.* Malleson	202
Pickard *v.* Sears	455, 458, 558, 562, 569, 584, 585, 606, 617, 630, 631, 632, 633, 634, 640, 643, 665, 714
Pickering *v.* Busk	561
v. Cape Town Ry. Co.	70, 71
Pickett *v.* Merchants' Bank	684
v. Pipkin	48, 150
Pico *v.* Webster	127
Pierce *v.* Andrews	629, 637
v. Carleton	140
v. Chicago R. Co.	141

	Page
Pike *v.* Fay	573
v. Galvin	405
v. Potter	101
v. Stallings	684
Pim *v.* Curell	36, 114, 234
Pinckard *v.* Milmine	365
Pinney *v.* Barnes	194
Pitcher *v.* Dove	618, 620, 629
Pitman *v.* Albany	68, 233
Pitt *v* Berkshire Ins. Co.	471
v. Chappelow	496, 497
Pittapur *v.* Garu	45, 93, 227
Pittsburg *v.* Danforth	570
Pittsburgh Ry. Co. *v.* Swinney	719, 723
Placer Co. *v.* Astin	515
Planché *v.* Colburn	194
Plant *v.* Voegelin	581
Planters' Bank *v.* Merritt	685
Planters' Ins. Co. *v.* Selma Bank	582, 629
Platt *v.* Squire	332, 361, 710
Platter *v.* Elkhart	598
Plets *v.* Johnson	485
Plott *v.* Chicago R. Co.	664
Plumb *v.* Cattaraugus Mut. Ins. Co.	709
Plume *v.* Beale	245
v. Howard Inst.	203, 230
Plumer *v.* Lord	575, 629
Plummer *v.* Farmers' Bank	581
v. Mold	627
v. Woodburne	285, 290, 309, 313, 705, 735
Pole *v.* Somers	677
Pollard *v.* Cocke	346
v. Hanrick	99
v. Railroad Co.	128
Pond *v.* Makepeace	149, 318
Pool *v.* Lewis	715
Poole *v.* Dilworth	99
v. Whitt	522
Poor *v.* Robinson	338, 339
Poorman *v.* Crane	294
v. Mitchell	706
Pope *v.* Bank of Albion	504
Porter *v.* Ingraham	111
v. Lazear	449
v. Porter	206
v Purdy	208
v. Robinson	117
v. Wagner	59, 152, 153
Potter *v.* Brown	686
v. Parsons	305
Potts *v.* Coleman	547
Powell's Appeal	339, 599, 603
Powell *v.* Clelland	68
v. Monson & M. Co.	340, 449
v. Rodgers	638
Powers *v.* Harris	561
v. Patten	402
Pratt *v.* Cunliff	140
Pratt *v.* Farrer	538
Pray *v.* Hegeman	150, 152, 153, 154, 164
Preble *v.* Baldwin	478
v. Conger	578
Prentice *v.* Stefan	571
Prescott *v.* Hull	316
Presstman *v.* Silljacks	517
Preston *v.* Mann	581, 610, 612
Prestwick *v.* Marshall	496
Prevot *v.* Lawrence	527
Price *v.* Breckenridge	718
v. Dewhurst	254
v. Jennings	605
v. Neal	481, 491, 492, 611
v. Pollock	334
v. Thompson	636
Prichard *v.* Houlditch	509
Prickett *v.* Sibert	617
Priestly *v.* Fernie	121, 124
Prince *v.* Brunette	496
Princeton *v.* Templeton	688
Pritchard *v.* Hitchcock	145
Pritchet *v.* Clark	264
Probate Court *v.* St. Clair	638
Probstfield *v.* Czizek	552
Proctor's Case	63
Proctor *v.* Bennis	587, 595, 610
v. Cole	58
v. Putnam Machine Co.	619
Proskauer *v.* People's Sav. Bank	698
Prout *v.* Wiley	683
Prouty *v.* Mather	404
Providence *v.* Adams	152
Providence Ins. Co. *v.* Fennell	471
Prudam *v.* Philips	210, 229
Pruitt *v.* Holly	87, 88, 702
Puckett *v.* Pope	292
Pulaski *v.* State	341, 598
Pulliam *v.* Burlinghame	548, 549
Pullman *v.* Upton	463, 470
Purdy *v.* Coar	358
v. Doyle	104
Pursly *v.* Hays	685
Putnam *v.* Clark	99
v. Tyler	617

Q.

Quackenbush *v.* Ehle	56
Queen *v.* Gamble	717
v. Hutchins	51
Quigley *v.* Mexico Bank	114
Quinlan *v.* Myers	669
Quirk *v.* Thomas	651

R.

Rabitte *v.* Orr	561, 562, 564, 673
Radcliff *v.* United States Ins. Co.	48, 241

	Page
Radway v. Graham	718
Railroad Co. v. Dubois	587
v. National Bank	114
v. Schulte	160
v. Schurmeir	341
Railway Co. v. Daniel	563
v. Graham	563
v. McCarthy	467, 717
v. Ramsey	203, 204, 718
Rainbolt v. Eddy	494
Raley v. Ross	546
v. Williams	615
Ralston v. Lahee	118
Ramsden v. Dyson	587, 610, 620, 665, 666, 671
Ramsey v. Henderson	619
Ranclyffe v. Parkyns	676
Randall v. Lower	359, 395, 412, 413
Randolph v. Keiler	286
Rangeley v. Spring	600, 715
Rangely v. Webster	274, 312
Rankin v. Barnes	284
v. Godard	264
v. Warner	331
Rannels v. Gerner	600, 603
Ransom v. Stanberry	698, 699
Rape v. Heaton	296
Rapelee v. Stewart	685
Rapelye v. Prince	133
Rathbone v. Boyd	569
v. Hooney	131
Ravee v. Farmer	69, 166, 190
Rawlinson v. Stone	496
Ray v. Gardner	357
v. Indianapolis Ins. Co.	466
v. McMurtry	639
Raymond v. Crown Mills	124
v. Holden	340, 449
v. Richmond	114, 150
Raynor v. Timerson	620
Read v. Hall	603
v. Sutton	88
v. Walker	712
Reagan v. Hadley	639
Reciprocity Bank, In re	563
Rector v. Board of Improvement	584, 594, 596, 688
v. Waugh	409
Redd v. Muscogee R. Co.	561
Redgrave v. Hurd	255, 610, 617, 627
Redington v. Woods	494
Redman v. Graham	561
Redwood v. Tower	365
Redwood Cemetery Assoc. v. Bandy	635, 668
Reed v. Douglas	154
v. Farr	620
v. Girty	275
v. Jackson	36
v. Lyon	525, 527
v. McCourt	382, 620
Reed v. Peterson	686, 688
Rees v. Chicago	688
v. Lloyd	397
Reese v. Smith	435
Reese Silver Mining Co. v. Smith	810
Reeves v. Brooks	450
v. Howes	340
Regina v. Ambergate Ry. Co.	597
v. Blakemore	144
v. Buckinghamshire	723
v. Liverpool	728
v. Salop	723
v. Shropshire Union Co.	561
Reichert v. Voss	684
Reid v. Darby	252
v. Holmes	119
v. State	340, 598
Reigard v. McNeil	687
Reimers v. Druce	263
Reis v. Lawrence	603, 604
Remington Paper Co. v. O'Dougherty	702
Remmett v. Lawrence	643
Remsen v. Graves	498
Renaud v. Abbot	275, 276
Rennick v. Bank of Chillicothe	685
Rennie v. Robinson	514
v. Young	665
Renovo v. Half Moon	232
Requa v. Holmes	684
Ressequie v. Byers	76, 178, 182
Rex v. Bentley	232
v. Bradenham	233
v. Cirencester	232
v. Grundon	64, 229
v. Rhodes	229
v. St. Pancras	91
v. Scammonden	478
v. Vincent	210, 229
Reynolds v. Blackburn	721
Ricard v. Sanderson	371
Ricardo v. Garcino	262
Rice v. Barrett	564
v. Bunce	617
v. Dewey	594
v. Rice	473, 561
v. Rock Island R. Co.	687
Rich v. Coe	121, 122
v. Rich	162
Richards v. Barlow	242, 262, 275
v. Johnston	609
Richardson v. Boston	172, 706
v. Hickman	140
v. Stewart	129
v. Wyman	449
Richman v. Baldwin	640
Riddle v. Hill	460
v. Murphy	345, 346
Rider v. Alexander	287
Ridgefield v. Reynolds	692
Riggan v. Green	498

	Page
Riggs v. Pursell	60
Right v. Bucknell	366, 377, 397, 424
Riker v. Hooper	84
Rikhoff v. Brown's Sewing Machine Co.	462
Riley v. Murray	281
Ripley v. Ætna Ins. Co.	662, 683
v. Billings	578
Ritchey v. Withers	229
Rivard v. Gardner	644
Riverside Co. v. Townshend	153, 182
Roach v. Brannon	578
v. Garvan	229, 244
v. White	448, 587
Robb v. Shephard	629
Robbins v. Blodgett	638
v. Bridgewater	219
v. Magee	699
v. Potter	627
Roberts v. Cooper	71
v. Davis	639
v. Read	171
v. Rice	166
v. Wentworth	642
Robertson v. Pickrell	345, 346, 357
v. Roberts	140
v. Smith	107
v. Struth	261, 309
Robeson v. Carpenter	139
Robins v. Crutchley	210, 227, 229
Robinson's Case	131
Robinson v. Bates	449
v. Douthit	433, 445
v. Green	198
v. Howard	57
v. Jones	46, 250
v. Pebworth	684, 685
v. Prescott	320, 346
v. Snyder	198
v. Ward	294
v. Yarrow	486, 488
Robson v. Eaton	292
Roby v. Chicago	461, 684
Rochell v. Benson	357
Rock v. Leighton	78, 131
Rockwell v. Brown	172
Rodermund v. Clark	673, 679, 685, 718
Roe v. Jerome	583
Rogers v. Beauchamp	36, 38
v. Blackwell	497
v. Burlington	469
v. Burns	281
v. Cromack	642
v. Grannis	148, 329
v. Gwinn	304
v. Haines	129
v. Higgins	600
v. Kimsey	80
v. Marsh	638
v. Odell	313
v. Pitcher	523, 530, 531
Rogers v. Ratcliff	164
v. Rogers	277, 281
v. Wood	61
Romford Canal Co., In re	365, 468, 470
Root v. Crock	397, 409
v. French	561
v. Lowndes	172, 174
Rose v. Himely	251
v. Hurley	581
Rosebrough v. Ansley	558
Rosenthal v. Mayhugh	449, 603, 629
v. Renick	318, 319
Ross v. Dysart	522
v. New England Ins. Co.	101
v. Thompson	587
Rossire v. Boston	689
Roswald v. Hobbie	476, 549, 567
Roundtree v. Turner	72
Rountree v. Denson	410
Rousillon v. Rousillon	49, 52, 204, 238, 265, 290, 297, 301
Routledge v. Hislop	200
Rowe v. Smith	76, 77
v. Williams	68
Rowley v. Bigelow	475, 476
v. Howard	205
v. Towsley	675
Rubber Co. v. Goodyear	67, 587
Rudd v. Matthews	492
Ruegger v. Indianapolis R. Co.	158
Ruff v. Ruff	141
Ruffin v. Johnson	397
Rumball v. Metropolitan Bank	561
Rumfelt v. Clemens	602
Rush Co. v. State	470, 598
Rusk v. Fenton	603
Russ v. Alpaugh	388, 389, 403, 432
Russell v. Erwin	512
v. Fabyan	510
v. Kierney	571, 709
v. Mallon	131, 132
v. Place	59, 61, 153
v. Smyth	238
Rust v. Bennett	578
Ruth v. Oberbrunner	229
Rutherford v. Davis	66
v. Taylor	636
v. Tracy	620
Rutland v. Rutland	148
Rutter v. Puckhover	118
Ryan v. Maxey	603
Ryder v. Mansell	507, 517

S.

Sacket v. Loomis	76
Sage v. McLaughlin	598
Sahler v. Signer	542
Sainsbury v. Jones	614
St. John v. Palmer	522

	Page
St. John v. Quitzow	517
v. Roberts	375, 505, 572
St. Joseph Manuf. Co. v. Daggett	598, 640
St. Louis v. St. Louis Gas Co.	627
v. Shields	464
St. Louis Gas Co. v. St. Louis	466
St. Louis R. Co. v. Belleville	336, 470, 598
v. Larned	617
St. Louis Stock Yards v. Wiggins Ferry Co.	666
St. Paul R. Co. v. First Div. St. Paul & P. R. Co.	341
Salem v. Eastern R. R.	48, 114
Salisbury Sav. Soc. v. Cutting	433
Salter v. Kidley	366
Saltus v. Everett	561
San Antonio v. Mehaffy	467, 469
Sanborn v. Fellows	219
Sanders v. Robertson	597
Sanderson v. Collman	497, 699
Sands v. Davis	345, 358
Sanford v. Cloud	547
v. Sanford	303, 403, 682
Sanger v. Wood	679
Saratoga Bank v. Pruyn	339, 603
Sarchet v. Sloop Davis	284
Sargeant v. Andrews	138
Sargent v. Fitzpatrick	187
v. Flaid	718
Saunders v. Merryweather	363, 539
Savage's Case	138
Savage v. Burnham	678
v. Dowd	571
v. Russell	464, 717
Saveland v Green	131
Sawyer v. Maine Insurance Co.	240, 251
v. Woodbury	61, 153, 183, 187
Saxton v. Dodge	553
Sayles v. Briggs	38
v. Smith	547
Scanlan v. O'Brien	567
Scates v. King	142, 143, 347, 595, 627
Schaeffer v. Bonham	467, 468
Schaidt v. Blaul	586, 666
Schenck v. Stumpf	600
Schertz v. People	53
Schibsby v. Westenholz	49, 52, 204, 238, 289, 290, 297, 301
Schmaltz v. Avery	644
Schmidt v. Mutual Ins. Co.	663
Schnell v. Chicago	600, 601, 605
Scholey v. Rew	673, 678
School Dist. v. Atherton	684
v. Stocker	51, 152, 164, 252
v. Stone	365, 366, 376, 468
Schraeder Mining Co. v. Packer	619, 620
Schroeder v. Lahrman	115, 135
Schuler v. Israel	103
Schwallback v. Chicago R. Co.	346
Schwartz v. Saunders	600, 603
Schwinger v. Hickok	297
v. Raymond	176
Scolly v. Butler	720
Scotland v. Hill	100
Scott v. Avery	68
v. Board of Comm'rs	692
v. Liverpool	68
v. Pilkington	260, 261, 262, 287, 312
v. Shearman	224
v. Strawn	669
v. Ware	36, 147
Scovill v. Thayer	470
Scranton v. Stewart	599
Scrimshire v. Scrimshire	244
Seavey v. Kirkpatrick	357, 546
Sebrell v. Hughes	357
Sebright v. Moore	561
Secombe v. Railroad Co.	206
Second Nat'l Bank v. Walbridge	475, 615, 622
Secor v. Sturgis	85, 198
Secrist v. Green	150, 207
v. Zimmerman	78
Security Bank v. Nat'l Bank	598
Seddon v. Tutop	167, 194, 195, 703
Seeman v. Springate	600
Segee v. Thomas	207, 290
Semple v. Bank	465
Seneca v. Allen	548, 684
Sergeant v. Ewing	100, 147
Serrao v. Noel	153, 154, 169, 171
Sessions v. Johnson	107, 112
v. Rice	629
v. Stevens	138
Seton v. Lafone	457, 494, 571, 615, 656, 658
Severin v. Eddy	134
Sewall v. Hebert	693
v. Sewall	244, 245
Sewell's Case	628
Seymor's Case	428
Seymour v. Page	578, 582
Sexton v. Chicago	598
Shamleffer v. Peerless Mill Co.	599
Shane v. Moberly	635
Share v. Becker	701
Sharp, In re	469, 691, 692
Sharp v. Findley	118
v. Taylor	553
Sharpe v. San Paulo Ry. Co.	68
Shaver v. Shell	66
Shaw v. Beebe	444, 716
v. Gould	244
v. Lindsey	129
v. Shaw	678
Shawhan v. Loffer	206, 290
Shay v. McNamara	136, 143, 348
Sheehan v. Fitchburg	688

	Page
Sheehy *v.* Mandeville	104, 106, 107
Sheen *v.* Stothert	370, 669
Sheffey *v.* Gardiner	377
Sheffield *v.* Collier	666
v. London Joint Stock Bank	566
Shelbury *v.* Scotsford	551
Sheldon *v.* Atlantic Ins. Co.	471
v. Kibbe	112
v. Stryker	73
v. Wright	206, 207
Sheldon Hat Co. *v.* Eichmeyer Hat Co.	457
Shelley *v.* Wright	366, 369
Shelton *v.* Aultman	562
v. Carrol	532
v. Tiffin	209, 293, 296
Shephard *v.* Little	476, 477
Shepherd *v.* May	597, 652
Sheridan *v.* Barrett	620
v. The New Quay Co.	551
Sherlen *v.* Whelen	349
Sherman *v.* Christy	73
v. McKeon	684, 718
v. Parish	683
v. Simons	469
Sherrard *v.* Nevius	209
Sherrod *v.* Langdon	564
Sherwood *v.* Alvis	463, 464
v. Vandenburgh	344
Shields *v.* Schiff	58
v. Smith	577
Shillock *v.* Gilbert	627
Shinn *v.* Young	152, 164
Shipley *v.* Fox	557, 626, 627
Shirland *v.* First National Bank	76, 77
Shirreff *v.* Wilks	564
Shivers *v.* Simmons	605
Shoemaker *v.* Atkins	187
Shorman *v.* Eakin	349, 459, 506, 546
Showers *v.* Robinson	713
Shroyer *v.* Richmond	373
Shultz *v.* Elliott	527, 530
Shumaker *v.* Johnson	403, 600
Shumway *v.* Stillman	270, 293, 302
Shuttlesworth *v.* Hughey	100
Sickels *v.* Patterson	198
Sidensparker *v.* Sidensparker	151
Sigerson *v.* Mathews	672
Silloway *v.* Brown	384
Silver Lake Bank *v.* Harding	322, 323
Simers *v.* Saltus	522
Simm *v.* Anglo-American Tel. Co.	642
Simmons *v.* Camp	561, 580
v. McKay	204
Simons *v.* De Bare	205
Simonton *v.* Liverpool Ins. Co.	574
Simplot *v.* Dubuque	688
Simpson *v.* Fogo	223, 243, 255, 262, 263
v. Moore	581, 611, 612
Sims *v.* Chattanooga	669
v. Everhardt	605
Simson *v.* Hart	53
Sinclair *v.* Murphy	548
v. Sinclair	244
Singleton *v.* Whiteside	622
Sinnett *v.* Moles	583
Sintzenick *v.* Lucas	88
Sizer *v.* Many	72
Skaife *v.* Jackson	471
Skinner *v.* Grace Church	693
Slade's Case	200
Slaughter *v.* Genson	582
Slee *v.* Bloom	137, 146
Slim *v.* Croucher	557, 612, 613, 615
Sloan's Appeal	312
Sloan *v.* Holcomb	673
Slocum *v.* Mayberry	226
Slocumb *v.* Chicago R. Co.	587
Small *v.* Reeves	357
Smelser *v.* Wayne Turnpike Co.	466
Smelting Co. *v.* Kemp	67
Smiley *v.* Fries	396
Smith *v.* Armstrong	603
v. Auld	58
v. Baker	409, 440
v. Brady	686
v. Brunswick	153
v. Busby	547
v. Chadwick	582
v. Connell	412
v. Crompton	132
v. Cropper	554, 638
v. De Russy	395
v. Elliott	172, 198, 705
v. Fairfield	60
v. Fenner	245
v. Fowler	571, 719
v. Graham	334, 372
v. Haire	721
v. Hall	715
v. Hamilton	622
v. Hitchcock	431
v. Hughes	629
v. Hutchinson	562, 587
v. Jones	194, 197
v. Keen	216
v. Kernochan	90
v. Knickerbocker Ins. Co.	581
v. Kremer	627
v. Lock	370
v. Lucas	676
v. McCluskey	191
v. McNamara	620
v. Marsack	496, 739
v. Mercer	490, 493
v. Morgan	131
v. Mundy	713
v. Munroe	581
v. Neal	51
v. Nicolls	290, 302, 308, 314
v. Palmer	177, 185
v. Penny	337

	Page
Smith v. Rathbun	717
v. Scott	510
v. Sheeley	684
v. Shepard	521
v. Smith	153, 216, 227, 228, 245, 274, 682, 683
v. Strong	404, 405
v. Sutton	554
v. Way	100
v. Weeks	76, 77
v. Whiting	189
v. Williams	241, 395, 407, 408
Snape v. Norgate	318
Sneed v. Osborn	621
Snell v. Faussatt	253
Snider v. Croy	703
Snodgrass v. Ricketts	444
Snook v. Fries	198
Snow v. Howard	73
v. Moses	382
v. Prescott	77
v. Walker	68
Snowden v. Grice	331
Snowdon v. Davis	191
Snyder v. Wise	321
Society for Manuf. v. Lehigh Valley R. Co.	716
Society for Prop. of Gospel v. Pawlet	345, 358
Soc. for Savings v. New London	461
Solberg v. Decorah	669
Solomon v. Bushnell	475, 622
Somes v. Skinner	429, 430, 432
So. Ala. R. Co. v. Henlein	89, 194
Southard v. Perry	685
v. Sutton	577
Southeastern Ry. Co. v. Warton	352, 380, 382
Southerland v. Stout	388
Southern Ins. Co. v. Booker	471
South Ottawa v. Perkins	101, 465, 467, 689
Soward v. Johnston	573
Spalding v. Wathen	119
Sparhawk v. Wills	60
Sparrow v. Kingman	339, 344, 356
Spears v. Walker	715
Speer v. James	147
v. Matthews	552
Spencer v. Carr	615
v. Spencer	245
v. Vigneaux	217
v. Williams	149
Spiller v. Scribner	715
Sponenbarger v. Lemert	374, 567
Spooner v. Davis	178
Sprigg v. Bank of Mt. Pleasant	694
Spring v. Hewston	622
Springport v. Teutonia Bank	114
Springstein v. Schermerhorn	360
Spoor v. Tyzzer	70
Spurlock v. Sproule	638
Squires v. Brown	137
Stace & Worth's Case	624
Stackpole v. Robbins	478
Stacy v. Thrasher	148, 317, 318
Stafford v. Albany	68
v. Clark	188
v. Elliott	578
v. Rice	480
Standish v. Parker	172, 706
Stanford v. Lyon	583
Stanley v. Epperson	578
Staple v. Spring	94
Staples v. Fillmore	374, 549, 567
Starbuck v. Murray	296
Starin v. Genoa	376, 469
Stark v. Starr	169, 187, 194
Starke v. Wilson	147
Starkweather v. Loomis	322, 323
Starry v. Korab	574, 576, 582
Star Wagon Co. v. Swezy	72
State v. Adams	683, 698
v. Alling	63
v. Anderson	460
v. Anone	63
v. Bevers	341
v. Bradish	441
v. Brewer	341, 598
v. Candler	273
v. Carroll	63
v. Cooper	498
v. Coste	124
v. Graham	341
v. Grammer	146, 639
v. Hardie	130
v. Hauser	688
v. Langer	684
v. Little	215
v. Little Rock R. Co.	689
v. McBride	77
v. Mills	373
v. Mitchell	689
v. Neuert	380
v. Ober	341
v. Ogle	642
v. Penner	642
v. Porter	63
v. Prather	146, 639
v. Rainey	137
v. Ramsburg	100
v. Rhoades	146
v. Roswell	132
v. Spaulding	460
v. Stone	460
v. Taylor	341
v. Wertzel	621
v. Williams	341
v. Woodside	146
v. Young	562
State Bank v. Fearing	482
v. Thompson	563

	Page
State of Illinois *v.* Delafield	503
Staton *v.* Bryant	629
v. Mullis	346
Steadman *v.* Duhamel	488
v. Taylor	609
Stearns *v.* Hendersass	405
v. Swift	448
v. Wrisley	189
Stebbins *v.* Bruce	629, 636
v. Walker	565
Steckett *v.* East Saginaw	469, 692
Stedman *v.* Davis	683
v. Patchin	280
Steed *v.* Petty	569, 600
Steel *v.* Smelting Co.	67, 68, 626
v. Smith	301
Steele *v.* Adams	580
v. Lineberger	148
v. St. Louis Ins. Co.	639
Steen *v.* Bennett	230
v. Steen	205
Stein *v.* Prairie Rose	194
Steinbach *v.* Relief Ins. Co.	84, 152, 673
Steiner *v.* Baughman	403, 440
Stempel *v.* Thomas	191
Stephens *v.* Baird	569, 637
v. Crawford	498
Stephenson *v.* Walker	571
v. Wilson	129
Stevens *v.* Brown	203
v. Dennett	569, 571, 629, 716
v. Dunbar	53
v. Fisher	139
v. McNamara	715
v. Miner	60, 142
v. Parish	600
v. Whistler	162
Stevenson *v.* Saline Co.	374
Stewart *v.* Anderson	399, 544, 545
v. Beck	699
v. Carleton	621, 622
v. Dent	100
v. Lansing	189
v. Metcalf	331, 627
v. Munford	561
v. Thomas	146
v. Warner	241
Stilley *v.* Folger	681
Stillman *v.* Stillman	571
Stilphen *v.* Houdlette	186
v. Stilphen	186
Stimson *v.* Farnham	638, 642
v. Whitney	564
Stingley *v.* Kirkpatrick	110
Stockman *v.* Riverside Co.	621, 671
Stockton *v.* Williams	351
v. Wooley	681
Stockwell *v.* Coleman	322
Stockyards *v.* Wiggins Ferry Co.	713
Stoddard *v.* Burton	114
Stoddard *v.* Cutcompt	673
v. Shetucket Foundry Co.	468
v. Thompson	114, 127
Stokeman *v.* Dawson	606
Stonard *v.* Dunkin	550, 647, 648, 649
Stone *v.* Covell	610
v. Dickenson	112
v. Great Western Oil Co.	611
v. Tyree	586, 712
v. Wood	147
Stoops *v.* Whistler	146, 150
v. Woods	131
Storer *v.* Storer	193
Storring *v.* Borren	675
Storrs *v.* Barker	573, 586
Stortzell *v.* Fullerton	119
Stout *v.* Lye	115
Stoutimore *v.* Clark	464
Stovall *v.* Banks	146, 150
Stowe *v.* Wyse	397, 409
Stowell *v.* Chamberlain	84, 86, 200
Strain *v.* Gardner	511
Strang *v.* Moog	53, 58, 90, 95, 99, 201, 202
Stratton *v.* Rastall	330
Straus *v.* Minzesheimer	639
Strauss *v.* Murtief	86
Strawn *v.* Strawn	339
Strecker *v.* Conn	564
Street *v.* Augusta Ins. Co.	222
Stribling *v.* Prettyman	719
Striker *v.* Keller	163
Stringer *v.* Northwestern Ins. Co.	638
Strong *v.* Makeever	68
v. Stevens Point	36
v. Strong	70, 71
v. Waddell	340, 544, 546
Strosser *v.* Fort Wayne	66, 616, 621, 673, 683, 690, 692
Strother *v.* Butler	152
Stroughill *v.* Buck	352, 369, 460
Strowd *v.* Willis	366
Struble *v.* Malone	281
Struggle, The	567
Stryker *v.* Cassidy	688
v. Goodnow	101, 223
Stubbs *v.* Johnson	581
Studdard *v.* Lemmond	585
Stump *v.* Findlay	677
Sturdy *v.* Jackaway	129
Sturgeon *v.* Hampton	470, 598
Sturgis *v.* Rogers	71
Sturtevant *v.* Randall	88
Stutsman *v.* Thomas	639
Succession of Monette	673
Suessenguth *v.* Bingenheimer	573
Sullivan *v.* Conway	638
v. Davis	596
Sulphine *v.* Dunbar	594, 627, 638
Sumner *v.* Barnard	359, 412
Sunderlin *v.* Struthers	334

	Page
Supervisors v. Kennicott	72, 99
Supples v. Cannon	88, 152, 703
Sutliff v. Brown	77
Sutlive v. Jones	544
Suttle v. Richmond R. Co.	713
Sutton's Appeal	684
Sutton v. Casselleggi	366
v. Wood	612
Suydam v. Barber	275
Swager v. Lehman	582
Swan v. North British Co.	457, 494, 504, 570, 610, 632, 655, 656
Swann v. Miller	467
v. Wright	465
Swanson v. Tarkington	684
Swartwout v. Mich. Air Line R. Co.	466
v. Payne	132
Swartz v. Swartz	666
Swayze v. Carter	584
Sweet v. Brackley	273
v. Brown	403
v. Tuttle	156
Sweetser v. Odd Fellows Assoc.	664
Swenson v. Creson	153
Swick v. Sears	713
Swift v. Dean	527, 530
v. Dickerman	172, 174
v. Winterbotham	650, 651
Swihart v. Spaner	150
Sykes v. Bonner	178, 179
Syllivan v. Stradling	507, 510
Syme v. Badger	674
v. Montague	354

T.

	Page
Taber v. Ferguson	688
Talbot v. Bank of Rochester	485
v. Radnor	678
Tallant v. Burlington	689
Talmadge v. Chapel	318
Tams v. Bullitt	139
v. Lewis	156
Tankersley v. Pettis	58
Tapley v. Wainwright	162
Tapp v. Lee	579
Tappan v. Bruen	108, 109
Tarleton v. Tarleton	260, 303
Tate v. Hunter	119
Taylor v. Agricultural Assoc.	713
v. Barron	264, 318, 320
v. Bradley	511
v. Brown	716
v. Bryden	264
v. Burnap	693
v. Castle	200
v. Croker	495
v. Dabar	440
v. Ely	592
v. Kilgore	281
v. McCrackin	56
v. Means	36
v. Nashville R. Co.	569, 598, 617
v. Needham	342
v. Phelps	139, 150, 264, 287, 314
v. Riley	598
v. Shew	261
v. Wallace	340
v. Zamira	516
Teague v. Corbitt	147
Telegraph Co. v. Davenport	606
Temple v. Williams	702
Tenant v. Elliot	553
Tennessee R. Co. v. East Ala. Ry. Co.	547
Terre Haute R. Co. v. Rodel	597
Terrell v. Grimmell	684
Terrett v. Cowenhaven	506
Terry v. Hammonds	57
Test v. Larsh	718
Teutonia Bank v. Wagner	373, 466
Teutonia Ins. Co. v. Anderson	471
Tewksbury v. Magraff	527, 528, 529, 530
Texas Banking Co. v. Hutchins	699
Texas Ry. Co. v. Gentry	467
Thames v. Jones	119, 137
Thatcher v. Howland	375
v. People	470, 692
Thayer v. Arnold	720
v. Bacon	618
v. Tyler	140
Thellusson v. Woodford	674
Thielen v. Richardson	400
Third Street, In re	68
Thistle v. Berford	444
Thomas v. Citizens' Ry. Co.	467
v. Cook	525
v. Hite	53
v. Hubbell	132, 134
v. Joslin	182
v. Ketteriche	160
v. Merry	80
v. Pullis	621
v. Robinson	322, 705
v. Sterns	148
Thomason v. Odum	152
Thompson's Appeal	216, 219
Thompson v. Building Assoc.	36
v. Campbell	713
v. Hoop	681
v. Howard	673
v. Ins. Co.	661
v. Lee Co.	287
v. McKay	720
v. Merrill	449
v. Myrick	153
v. Nat. Bk. of Redemption	57
v. Roberts	128
v. Simpson	606

	Page
Thompson v. Whitman	203, 204, 206, 270, 296, 705
v. Wood	194
Thomson v. Wooster	75
Thorne v. Tilbury	552
Thornton v. Baker	204, 718
v. Thompson	184
Thouvenin v. Rodriques	216
Thurlough v. Kendall	717
Thurston v. Thurston	51, 729
Tibbetts v. Shapleigh	109, 360, 719
v. Tibbetts	674
Tibbs v. Allen	204
Tiernan v. Roland	675
Tiffany v. Anderson	629
Tifft v. Munson	432
Tilghman v. Little	519, 547
Tilley v. Bridges	90, 95
Tillotson v. Mitchell	578, 618, 637
Tilson v. Davis	100, 201
Tilton, The	246, 252
Tilton v. Gordon	77
v. Nelson	573, 582
Tilyou v. Reynolds	363, 539
Tioga R. Co. v. Blossburg & C. R. Co.	100
Tipton v. Locomotive Works	376, 469
Tobey v. Bristol	68
v. Taunton	334, 371
Tobin v. Allen	639
Toby v. Brown	235
Todd v. Flournoy	143, 205
v. Gee	614
v. Kerr	689
v. Old Colony R. Co.	122
Tolman v. Smith	589
v. Sparhawk	619
Tompkins v. Tompkins	245
Tone v. Columbus 465, 469, 689, 691,	692
Torrey v. Pond	102
Towles v. Fisher	601, 603
Town v. Blackberry	688
v. Needham	608
Towne v. Butterfield	538, 547
Towns v. Nims	159
Townsend v. Bush	480, 557
v. Cowles	629
v. Moore	245, 247
Townsend Bank v. Todd 578, 582, 597, 638, 639, 644, 650,	713
Tracy v. Goodwin	132, 146
v. Lincoln 599, 612, 629,	631
Trafton v. Hawes	533
v. United States	107
Trask v. Hartford & New Haven R. R.	195, 196
Travel ers' Ins. Co. v. Edwards	565, 661
Trayhern v. Colburn	153, 154
Treadwell v. Stebbins	168
Tredway v. McDonald	153
Trentman v. Eldridge	337, 338, 339
Trenton Banking Co. v. Duncan 586,	585, 587
Trenton R. Co. v. Chambers	671, 672
Trevivan v. Lawrance 342, 390,	421, 432
Trexlor v. Miller	212
Tribble v. Anderson	558, 566
Trieber v. Commercial Bank	563
Troyer v. Dyar	699
Trueblood v. Knox	374, 567
Trufort, In re 230,	261, 262
Trull v. Eastman	405
v. Skinner	444, 578
Tucker v. Clarke	485
v. Conwell	585
Tufts v. Charlestown	370
v. McClure	663
Tuite v. Stevens	371, 685
Tully v. Tully	542
Tupper v. Phipps	218
Turbill's Case	138
Turner v. First National Bank	544
v. Flinn	473, 479
v. Waddington	268
v. Waldo	645
Turnipseed v. Hudson 570, 574,	578, 699
Tuska v. O'Brien	152, 164
Tuttle v. Harrill	153
Twitchell v. Bridge	610
Twogood v. Pence	73
Tyler v. Bailey	493
v. Mass. Ins. Co.	562
v. Odd Fellows Assoc.	629, 688

U.

Uhl v. Harvey	564
Umlauf v. Umlauf	80
Underwood v. McVeigh	203
Unfried v. Huberer 76, 78,	131, 599
Union Depot Co. v. St. Louis	461
Union Ins. Co. v. McGookey	685
v. Slee 638, 639,	684, 688
Union Petroleum Co. v. Bliven Petroleum Co.	129
Union R. Co., In re	204
Union Sav. Assoc. v. Kehlor	562
Union Sav. Inst. v. Wilmot	581
Union School Township v. First National Bank	470, 598
United Society v. Underwood	112
United States v. Ames	107
v. Chouteau	88
v. Cushman	112
v. Ellsworth	686
v. Flint	254, 307
v. Hodson	352
v. Kilpatrick	341, 598
v. Lane	703
v. Lawson	686
v. Parker	51, 72

PAGE

United States v. Price 107, 111
v. Reiter 66
Unity Joint Stock Assoc. v. King 606
University v. Maultsby 561
Unthank v. Travelers' Ins. Co. 665
Upshaw v. Gibbons 605
v. Upshaw 675, 679
Upton v. Tribilcock 470
Usher v. Richardson 448, 449
Usina v. Wilder 305
Utterback v. Phillips 389

V.

Vagliano v. Bank of England 457, 481, 485, 494, 495, 498, 612, 631, 654, 656
Valentine v. Mahoney 131, 132, 134
Valle v. Clemens 399
Vallejo Land Assoc. v. Viera 399
Vallette v. Bennett 457, 693
Van Alen v. Rogers 165
Van Bibber v. Beirne 578
Vance v. Johnson 543, 544, 545
Vandenheuvel v. United Ins. Co. 241
Vanderpoel v. Van Valkenburgh 232
Vanderpool v. Brake 581
Vanderwerker v. Vermont Cent. R. Co. 70
Van Doren v. Horton 216
Van Fossen v. State 244, 245
Van Hook v. Whitlock 689
Van Horn v. Overman 617, 638
Van Horstrup v. Madison 470
Van Metre v. Wolf 117
Van Ness v. Hadsell 471, 618, 639
Vanneter v. Crossman 629
Vanquelin v. Bouard 260, 302
Van Rensselaer v. Kearney 377, 396, 398
Van Santen v. Standard Oil Co. 475
Van Steenbergh v. Bigelow 208
Van Vechten v. Terry 136
Vardier v. Railroad Co. 340, 698
Vardon, In re 676
Varnam v. Smith 509, 510
Vaughan v. Morrison 160
v. Suggs 230
v. Vanderstegen 603
Veale v. Warner 507
Venable v. Beauchamp 411
Vere v. Lewis 485
Verplanck v. Van Buren 119
Vibbard v. Roderick 561
Vicksburg R. Co. v. Ragsdale 635
Viele v. Judson 596, 632
Vinton v. King 60
Vooght v. Winch 697, 698
Voorhees v. Seymour 151
Voorhies v. White 345, 358
Voorhis v. Olmstead 639, 645
Vose v. Cockcroft 689

PAGE

Vredenburgh v. Burnet 441, 442
Vreeland v. Ellsworth 584

W.

Waddle v. Ishe 56
Wade v. Bunn 713
v. Howard 55
Wadhams v. Gay 74, 102
v. Swan 395
Wadleigh v. Marathon Bank 345
Wadsworth v. Connell 51, 729
Waggener v. Lyles 547
Wagner's Appeal 587
Walbridge v. Shaw 56
Walcott v. Swampscott 689
Walden v. Bodley 58, 534
Waldron v. McCarty 522
v. Sloper 561
v. Toledo Ry. Co. 693
Walker v. Ames 77
v. Carleton 578
v. Chase 188
v. Hall 410
v. Mitchell 100
v. Mulvean 685
v. Richardson 525
v. Sioux City Co. 382
v. Walker 597, 722
v. Witter 237, 256, 258, 260
v. Worcester 371
Wallace v. McConnell 141
v. Maxwell 341
v. Miner 339
v. Minneapolis Elevator Co. 660
Walling v. Beers 52, 252, 290
Walsh v. Durkin 103, 311
v. McIntire 75, 97
v. Varney 673
Walthall v. Rives 360
Walton v. Shelly 557
v. Waterhouse 393
Wandling v. Straw 203, 206, 209
Wannell v. Kem 627, 628
Wanzer v. Bright 52, 307
v. De Baun 220
Ward v. Allen 486
v. Berkshire Ins. Co. 599
v. Johnson 107, 467
v. McIntosh 360
v. Rich 171
v. Ryan 506, 541
v. State 66
Warder v. Baldwin 638, 645
Ware v. Percival 83, 80, 200
Warfield v. Davis 121
Waring v. Reynolds 117
Warner v. Comstock 122, 146
v. Middlesex Assur. Co. 715
Warren v. Comings 194

	Page
Warren *v.* Flagg	319
v. Hearne	609
v. Lusk	209, 293
v. Milliken	646
v. Spencer Water Co.	55, 597
Warrender *v.* Warrender	244
Warrenton *v.* Arrington	552, 684
Washington Bridge Co. *v.* Stewart	203
Washington Ins. Co. *v.* Colton	382
Washington Packet Co. *v.* Sickles	88
Waters's Appeal	343
Watertown *v.* Cowen	603
v. White	647
Water Witch, The	681
Watkins *v.* Holman	301, 345, 353
Watson *v.* Hewitt	598
v. Hopkins	209
v. Knight	590
v. Lane	541
v. McLaren	596
v. New England Bank	293
v. Watson	673, 683
Watt's Appeal	609
Watt *v.* McGalliard	683
Watters *v.* Smith	105
Watterson *v.* Lyons	571
Watts *v.* Gayle	146, 150
v. Welman	361
v. Wilson	164
Way *v.* Arnold	438
v. Howe	302
v. Lewis	123, 146, 150
Wayland *v.* Porterfield	276
Weale *v.* Lower	417, 439
Weathersbee *v.* Farrar	600, 603
Webb *v.* Alexander	522
v. Austin	390, 420, 421
v. Buckalew	59, 60
v. Cook	229
v. Davis	349, 459
v. Herne Bay Co.	365, 376, 468, 470
Webster *v.* Bailey	627
v. Lee	69, 166
v. Lowell	140
Wedge *v.* Moore	344
Weed *v.* Burt	103
Weed Sewing Machine Co. *v.* Emerson	352, 395
Weedon *v.* Landreaux	673
Weeks *v.* Pearson	104, 311, 318
Weikel *v.* Long	73
Weil *v.* Uzzell	345
Weinstein *v.* National Bank	611
Weiser *v.* Weiser	410
Welby *v.* Welby	677
Welch *v.* Sykes	293
Weld *v.* Baxter	393
v. Farmington	664
Welland Canal Co. *v.* Hathaway	569
Wellborn *v.* Finley	352
Wells *v.* Sheerer	534
Welsch *v.* Belleville Bank	460
Wendell *v.* Van Rensselaer	586, 665
West *v.* Menard Agr. Board	488
v. Platt	152
v. Tilghman	718
West Buffalo *v.* Walker	232
Westcott *v.* Brown	293, 296
Western M. Co. *v.* Peytonia Coal Co.	395
v. Virginia Coal Co.	100, 128, 160
Western Union R. Co. *v.* Wagner	475
Westerwelt *v.* Lewis	301
Westobey *v.* Day	140
Wetter *v.* Rucker	138, 140
Wetumpka *v.* Wetumpka Wharf Co.	152, 154, 201, 202
Weyauwega *v.* Ayling	468, 470
Weyh *v.* Boylan	347, 581, 596
Weyr *v.* Zane	281
Whalin *v.* White	511, 522
Wheatley, In re	676
Wheeler *v.* Aldrich	140
v. New Brunswick R. Co.	584
v. Wheeler	599
Wheelock *v.* Henshaw	362
v. Kost	466, 687
v. Lee	719
Whicker *v.* Hume	230, 245
Whipple *v.* Parker	466
v. Robbins	141
Whistler *v.* Webster	674, 675
Whitaker *v.* Bramson	73, 78
v. Merrill	220
v. Williams	612
White *v.* Ashton	574
v. Barlow	514
v. Brocaw	403
v. Buccleuch	74
v. Crow	52, 304
v. Garden	186
v. Hapeman	718
v. Jones	209
v. Kyle	129
v. Merritt	76, 175, 178, 185
v. Morgan	565
v. Moseley	168, 194, 195
v. Patten	432
v. Smith	370
v. Walker	577
v. Ward	77
v. Wilks	475
Whitehouse *v.* Frost	475
Whitfield *v.* Fausset	428, 436, 440
Whitford *v.* Crooks	127, 136
Whiting *v.* Beebe	104
v. Dewey	375
v. Johnson	301
Whitman *v.* Bolling	585
v. Merrill	97
Whitmore *v.* Nickerson	565
Whitney *v.* Allaire	718

	Page
Whitney *v.* Clarendon	171
v. Porter	118, 204
v. Robinson	466
v. Walsh	225
Whitney Arms Co. *v.* Barlow	407
Whittaker *v.* Whittaker	395, 440
Whittemore *v.* Stephens	700
Whittier *v.* Wendell	312
Whittington *v.* Wright	606
Whitton *v.* Peacock	363
Whitwell *v.* Vincent	683
v. Winslow	572, 573
Wickersham *v.* Whedon	105
Wiece *v.* Marbut	345
Wieland *v.* Kobick	605
Wiggin *v.* Wiggin	523
Wight *v.* Shaw	389, 404
Wilbur *v.* Abbot	275
v. Goodrich	666
Wilcher *v.* Robertson	151, 203, 206
Wilcox *v.* Howell	583, 625
v. Kassick	296
Wilcoxon *v.* Osborn	345, 346
Wilder *v.* St. Paul	636
Wiles *v.* Woodward	354
Wiley *v.* Pratt	203, 208
Wilhelm *v.* Caul	194
Wilkins *v.* Judge	99, 202
v. May	357
Wilkinson *v.* Dent	676, 677
v. Hall	141, 314
v. Johnson	488, 490
v. Kirby	733
v. Scott	478
v. Searcy	581
v. Wilson	135, 571, 720
Wilks *v.* Georgia R. Co.	464
v. Kilpatrick	604
Willard *v.* Sperry	194
v. Whitney	88
Willets *v.* Phœnix Bank	504
Williams *v.* Allison	683
v. Armroyd	242
v. Clouse	153
v. Conger	346
v. Fitzhugh	183
v. Gideon	684
v. Glenny	638
v. Heales	511
v. Jackson	629
v. Jersey	716
v. Jones	238, 265
v. Matthews	505
v. Niagara Ins. Co.	561
v. Preston	264
v. Saunders	230, 245
v. Suffolk Ins. Co.	226
v. Sutton	112
v. Swetland	274
v. Vail	567
v. Walbridge	480, 503, 557
Williams *v.* Williams	47, 75, 152, 157, 160, 164, 229, 231, 242
v. Wilmington R. Co.	475, 622
Williamson *v.* Mimms	582
v. New Jersey R. Co.	669
v. Woodman	378
Willink *v.* Morris Canal Co.	186
Willison *v.* Watkins	534, 544, 545, 546
Willmott *v.* Barber	665
Willoughby *v.* Middleton	675, 676
Wilmer *v.* State	639
Wilmington Mining Co. *v.* Allen	666
Wilson *v.* Anderton	550, 551
v. Chalfant	666
v. Deen	80, 87, 96, 189, 201
v Henry	129
v. Jackson	296
v. Maltby	542
v. Niles	301
v. Ray	57
v. Townsend	675
v. Tunstall	309
v. Western Land Co.	349, 558
v. Widenham	402
v. Williams	503
v. Wilson	555
Wilt *v.* Welsh	602
Wimmer *v.* Ficklin	713
Winchester *v.* Evans	264, 268
v. Heiskell	114
v. Jackson	306
Winegar *v.* Fowler	638
Wingate *v.* Haywood	150, 203
Winlock *v.* Hardy	345, 356, 358
Winn *v.* Cabot	375
Winnard *v.* Robbins	547
Winship *v.* Winship	681
Winsmith *v.* Winsmith	473
Winstell *v.* Hehl	522
Winthrop Iron Co. *v.* Meeker	58
Winton *v.* Hart	561
Wisconsin *v.* Torinus	85, 202
Wisconsin Central R. Co. *v.* Wisconsin Land Co.	346
Wise *v.* Fuller	573
v. Hilton	139
v. Rhodes	674
Withers *v.* Reynolds	198
v. Sims	87, 153
Withington *v.* Warren	70
Witte *v.* Lockwood	178
Witzler *v.* Collins	475
Wivel's Case	437
Wixom *v.* Stephens	51
Woburn *v.* Henshaw	346, 357, 360, 545, 546, 552, 684
Wohlford *v.* Compton	56, 72
Wolcott *v.* Wolcott	212
Wollaston *v.* King	674
Womack *v.* Dearman	287
Wood *v.* Bayard	119

	Page
Wood *v.* Chapin	332, 384
v. Corl	168
v. Fant	53
v. Gamble	319
v. Humphrey	68
v. Jackson	60, 88, 160
v. Nichols	699
v. Ostram	698, 699
v. Rawlings	720
v. Seely	607, 684
v. Terry	339
v. Turner	544
v. Vance	605
v. Watkinson	299
Woodbridge *v.* Banning	56, 411, 412
Woodgate *v.* Fleet	152
Woodhull *v.* Rosenthal	596
Woodley *v.* Coventry	549, 647
Woodruff *v.* Erie Ry. Co.	514
v. Taylor	284, 300
Woods *v.* North	435
v. Pangburn	172, 174
v. Russell	198
v. Wilson	587
Woodward *v.* Tudor	617
Woodworth *v.* Paige	449
Wooley *v.* United States	66
Worcester Med. Inst. *v.* Harding	466
Worrall *v.* Gheen	494
Wortham *v.* Gurley	607
Wray *v.* Davenport	693
Wright's Appeal	570
Wright *v.* Andrews	135, 209, 290, 292, 293, 296, 297, 301
v. Arnold	603
v. Boynton	290
v. De Groff	337, 589
v. Deklyne	59
v. Lang	146, 565
Wright *v.* Leonard	603, 604
v. McPike	638
v. Newton	611, 618
v. Phillips	115
v. Snow	606
v. Tukey	375
v. Willis	635
v. Wright	428, 437, 440
Wyatt *v.* Rambo	140, 252

Y.

Yarborough *v.* Avant	202
Yare *v.* Gough	318
Yates *v.* Hurd	453, 683
Yeoman *v.* Younger	100, 230
York *v.* Allen	357
Yorkly *v.* Stinson	674
Yorks *v.* Steele	135
Young, Ex parte	146, 150
Young *v.* Babilon	587, 669
v. Grote	494, 654
v. Mutual Ins. Co.	471
v. Pritchard	95, 153
v. Raincock	352, 369
v. Stoutz	114
Youngblood *v.* Cunningham	661

Z.

Zell's Appeal	632
Zeller *v.* Eckert	534
Zimmler *v.* San Louis Water Co.	366
Zoeller *v.* Riley	142, 702
Zottman *v.* San Francisco	686
Zuchtmann *v.* Roberts	629, 635
Zwietusch *v.* Walkins	687, 718

THE LAW OF ESTOPPEL.

INTRODUCTION.

THE LAW OF ESTOPPEL.

NATURE OF ESTOPPEL.

THE law of Estoppel is the law of rights conferred or fixed in one of three ways, namely, by record, by deed, or by facts in pais. The term 'record' signifies, (1) the legislature's roll, (2) the judgment roll of a court of competent jurisdiction; 'deed,' a contract under seal, and especially a conveyance of land or some interest therein; 'facts in pais,' (1) facts fixed by or in virtue of contract, (2) acts or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged.[1] It may be observed of the third class of estoppels, however, that they sometimes arise upon sealed instruments also, as in the case of a tenancy by lease under seal; but in such cases, while the lease may produce one or more estoppels by deed, the main estoppel arising upon it (that by which a tenant is precluded from denying his landlord's title) is of the same force and effect as where the tenancy arises in pais. And hence the tenant's estoppel, whether the

[1] In the fluctuating condition of the law description of the term 'estoppel' is believed to be preferable to strict definition. Further, see chapters 2, 7, 13.

holding be by sealed lease or otherwise, is treated under the third division of the subject.

Originally the law of estoppel had regard to facts only; the record, the deed, the matter in pais, each established some fact or some set of facts. It is still true that the law of estoppel, in its ordinary manifestation, has regard to facts; but then it has been extended in recent times, in name at least, to excuses of undertakings and duties.[1] Through all its phases, however, its distinguishing feature is that of a right[2] conferred, which, whether founded upon the established fact or the waiver of performance of a duty, is to be taken specifically, and not in some alternative. This is the link which binds together subjects so different in appearance as judgment, deed, and matter in pais.

These divisions of the law of estoppel find their origin early in this common conception; but they do not appear together from the first. Historically, they are separated by three long and indefinite periods, which may be termed the ancient, middle, and recent. To the first period belongs the doctrine of estoppel by record; to the second belong the doctrines of estoppel by deed, and also of estoppel in pais as it existed prior to and in the time of Coke; to the third belongs the modern doctrine of estoppel in pais. No definite limits can be assigned, as has been intimated, to the origin of either of these branches of estoppel. The first has

[1] If all cases in which a duty not in point of fact performed, but under the circumstances to be taken specifically as performed, were to be treated as falling under the head of estoppel (and why not, if waiver is to be so treated?) a wide field is opened. It may be doubted if anything is gained by calling waiver estoppel.

[2] Conversely, a burden of course.

existed of course from the time of the constitution of courts; the second is found in the earliest collections of the English law;[1] the third has grown up within a century,[2] and is still growing rapidly, though some of its growth is fictitious, being only a change of nomenclature.

But though the conception of rights by estoppel is thus a very old one and appears to be most reasonable, and though it has been steadily expanding, especially during the present century, it has not always been regarded with favor. The courts used to call estoppels odious; indeed, they have not yet ceased altogether to apply the term to them. The definition given by Coke has often been referred to as giving ground for the application of the term. He said that the name 'estoppel,' or 'conclusion,' was given 'because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.'[3] The definition certainly was not felicitous; and if it were altogether correct, the doctrine of estoppel might well be regarded as odious.[4] It seems to be true, however, that in Coke's day the doctrine was not favored, perhaps because it was in fact sometimes used to shut out the truth against reason and sound policy.[5]

[1] Statham's and Fitzherbert's Abridgments, and Year-Books temp. Edw. 2, annis 1307–1326. These are the earliest printed volumes of the Year-Books, except some of the reign of Edw. I. recently printed by authority of the Master of the Rolls.

[2] See chapters 2, 5, 6, 7, 11, 13, 14.

[3] Coke, Litt. 352 a.

[4] Messrs. Everest & Strode, in a new and creditable piece of work, have collected and commented upon the English dicta in regard to the supposed odiousness of estoppels. Estoppel, 9–16.

[5] Note to Duchess of Kingston's Case, 2 Smith's L. C. 693, 6th Eng. ed. A survival may be seen in Folger *v.* Palmer, 35 La. An. 743, admission of a *witness* held conclusive. See chapter 3

In modern times the doctrine has lost all ground of odium and become one of the most important, useful, and just factors of the law.[1] It is safe to say that at the present day it is seldom employed in any questionable way to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined. A just principle, it can be and is daily administered to the well-being of society; unfortunate indeed would it be if this were not true. Estoppel would hardly have needed a justification but for the authority of a definition by Sir Edward Coke.

The right conferred by an estoppel may be a right in personam, available only against or by determinate persons; or it may be a right in rem, available inter omnes.

Where the estoppel creates a right in personam only, as is ordinarily the case, the meaning is that the claims of others than those who were parties to the transaction in question were not carried into the estoppel There is a perfect estoppel, but a limited right.

Where on the other hand the claims of all who were legally interested were embraced, the estoppel creates a right in rem, as broad as the sale of a chattel by one exclusively owning it. Thus, if those who have the exclusive right to try a cause before the courts try it lawfully, or if a cause is tried to which all the world are made parties according to law, judgment for the plaintiff will create a right available not merely be-

[1] Caldwell *v.* Smith, 77 Ala. 157, 165.

tween the contestants but generally; though this would not be true in regard to the findings or the grounds of the decision. The right in regard to those would be in personam.[1] Again, if A, having no title to a piece of land, should undertake to convey it to B, with warranty, and should afterwards acquire full title to it, the full title would inure to B, and his right, beginning and accruing by estoppel, would be 'fed'[2] into a right in rem of the broadest; for in the case supposed no one else has any right in the property.[3] So again if the sole owner of a horse stand by and permit another to sell it as his own, and I buy it in ignorance of the real ownership, I have acquired a right by estoppel against the owner; and that right is an equally broad right in rem, because he was the sole owner.[4]

These are typical illustrations of the three divisions of the substantive law of estoppel. Besides this substantive law there is an adjective law of the subject.[5] To see the process in which the whole law is worked out is the object of this book.

An elementary statement of the principles of the law of estoppel will now be made, to be expanded and illustrated in the text following.

[1] See chapter 2.

[2] A figure of the older law, which now must be taken cautiously. See chapter 11, § 4.

[3] See chapter 11.

[4] See chapter 18.

[5] Part IV.

INSTITUTES.

THERE is a twofold estoppel arising by record, i. e. from the proceedings of the courts: first, in the record considered as a memorial or entry of the judgment; and secondly, in the record considered as a judgment. In the first case mentioned, the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them, but against strangers also; no one may produce evidence to impeach it.[1]

The estoppel of a record as a judgment is of greater importance. The force and effect of a judgment depend, first, upon the nature of the proceeding in which it was rendered, i. e. upon the question whether it was an action in rem or in personam; and secondly, upon the forum in which it was pronounced, i. e. upon the question whether it was a judgment of a domestic or of a foreign court.

A judgment in rem, a description of which — the term cannot be concisely defined — will be found in the second chapter of the text, is conclusive upon all persons.[2] Proceedings in attachment, replevin, and the like, are sometimes spoken of as proceedings in rem, but not with accuracy. The judgment in these cases binds only parties and privies, not strangers also. A judgment in personam binds only the parties to the proceeding and those in privity with them. It has ordinarily no effect upon the rights of third persons.[3]

[1] Chapter 1. [2] Chapter 2.

[3] Ib., where the distinctions between the two kinds of judgments are set out.

In order to work an estoppel and preclude the parties from relitigating questions once adjudicated, the judgment must have been rendered by a legally constituted court.[1] This conclusiveness has, however, sometimes been extended to the decrees of tribunals other than the ordinary public courts of justice. A college sentence of expulsion was held conclusive in a case before Lord Mansfield.[2] Judgments of military courts and of courts-martial are also conclusive.[3]

The judgments of the ordinary domestic courts of inferior jurisdiction are conclusive, if it appear that they have acquired jurisdiction.[4] The following classes of judgments among others have also been held to be unimpeachable within limits, except by appeal or by some direct proceeding to set them aside: the decisions of the comptroller of the currency, the commissioner of patents, agreed judgments, awards of arbitrators, judgments by confession, and judgments by default.[5]

In all cases, however, in order to preclude the parties and their privies from contesting the matters again, the judgment must have been final, and rendered upon the merits, and judgment must in fact have been entered.[6] It must also have been valid. If void it cannot work an estoppel; but it is otherwise of voidable judgments.[7] If, however, the judgment possess all these elements, it is held to be immaterial whether it was rendered before or after the commencement of the action in which it is interposed as an estoppel.[8]

Judgments, however, possess this conclusiveness only in respect of such matters as were necessary to the decision of the case. In regard to facts not material the judgment is not conclusive, but may be collaterally impeached.[9] With this qualification matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to and certain of reversal in a higher

[1] Chapter 2. [2] Ib. [3] Ib. [4] Ib. [5] Ib.
[6] Ib. [7] Ib. [8] Ib. [9] Chapter 8.

court.[1] We must now proceed to a more detailed examination of this subject. And first, of domestic judgments in personam.

This subject is divided into four branches: first, estoppel by former judgment; secondly, estoppel by verdict; thirdly, the special extent and operation of judgment and verdict estoppels; and fourthly, the impeachment of judgments in collateral actions.

The rule in respect to the first division is that the judgment of a court of competent jurisdiction may be relied upon as an estoppel in any subsequent case founded upon the same cause of action.[2] The maxim is, 'Nemo bis vexari debet pro una et eadem causa.' The rule in criminal law, that no one shall twice be put in jeopardy of life or limb for the same offence, is the counterpart of this doctrine; but it is not the same thing.

In the case of estoppel by verdict it is immaterial whether the cause of action in which the verdict was given, was the same in the subsequent suit or not. The rule in this case is that a point once determined between the same parties, or those under whom they claim, may be relied upon as an estoppel in any cause of action that may thereafter be tried. The estoppel arises upon the special findings of the jury. But though it is not necessary that the cause of action should be the same in both cases, it is essential that the point decided should be precisely the same as the one raised in the subsequent suit.[3]

In regard to the effect and operation of judgment and verdict estoppels, it is, in the case of proceedings in personam, a general rule that only parties and privies are bound by or may take advantage of the adjudication.[4] The estoppel must be mutual; it cannot be employed by or against strangers. The term 'parties' embraces all persons having a right to control the proceedings, make defence, adduce and cross-examine witnesses, and to appeal from the decision when an appeal lies.[5] In some cases, however, persons not parties to an action may take advantage of the judgment. In the case of a judgment

[1] Chapter 8. [2] Ib. [3] Ib. [4] Ib. [5] Ib.

against one of several joint contractors, if an action be thereafter brought against another of the contractors, he may plead the judgment rendered against his fellow, and this, according to the principles of the common law, will bar the action. This proceeds upon the ground of merger. The plaintiff had but one cause of action, and this was merged by the former proceedings into the higher claim of a judgment.[1]

This result, however, is not effected, according to the American law, by a judgment against one of several joint tortfeasors; only the defendant and those claiming under him can plead the judgment. The tort is considered as joint and several.[2] In England the same rule prevails in such a case as in the case of a judgment against one of several joint contractors. It is there held that the tort is joint only, and that it becomes merged in the judgment whether rendered against a part, or all, of the wrongdoers.[3]

In other cases where the parties are really the same, though nominally different, the judgment will work an estoppel upon the real parties; as in the case of a judgment obtained by a principal or by a bailor, which estops the agent or bailee to sue upon the same cause of action.[4] But the converse of this rule does not hold unless the suit be brought at the instance of, or be acquiesced in, by the principal or bailor.[5] Judgment in ejectment, under the old fictitious form of proceeding, is another instance of this kind.[6] A different rule prevails where the parties are nominally the same but really different; judgment in such cases does not per se operate as an estoppel upon the real parties.[7]

Persons liable over are bound by judgments against the parties to whom they are so liable, upon notice to appear and defend;[8] but one who was merely a witness upon the former trial will not, it seems, be bound by the judgment; for appearing as a witness does not give a person the rights of a party.[9]

[1] Chapter 3. [2] Ib. [3] Ib. [4] Ib. [5] Ib.
[6] Ib. [7] Ib. [8] Ib. [9] Ib.

Judgment upon garnishment or trustee process operates as an estoppel in an action by the original creditor of the garnishee or trustee, to the extent of the judgment. But the creditor may prove that the debt is greater than it was admitted to be by the debtor.[1]

It is an important qualification of the rule that judgments bind the parties, that they bind them only in the character in which they appeared in the proceedings. A judgment against a person as administrator does not bind him in his own character. And the like is true of estoppels generally.[2]

There are some cases in which judgments in personam operate upon strangers. One of these cases is where a person is affected by a chain of title under a judgment, sale, and execution. When a judgment is introduced as a document connected with the chain of title, the other party will not be permitted to impeach it upon the ground that it is res inter alios acta.[3] And generally judgments in personam, when not fraudulent, are conclusive upon third persons of the relationship established between the parties, and of the extent of that relationship.[4]

In the law of estoppel a person stands in the relation of privy to another (1) by *succeeding* to the position of that other as regards the subject of the estoppel, (2) by *holding* in subordination to the rights of that other. Privity may exist in law, in blood, or in estate; and the privy will be bound by the estoppel as a burden, or have the benefit of it as a right, according to the case.[5]

There is no privity in the relations of guarantor and principal, surety and principal, co-sureties, and the like, in the sense of making judgments against the one operate directly against the other, without notice to appear and defend.[6] Nor is a judgment against an administrator or executor conclusive at common law against an heir or devisee of the deceased.[7] But an adminis-

[1] Chapter 3. [2] Ib. [3] Ib. [4] Ib.
[5] Ib. [6] Ib. [7] Ib.

trator is in privity with his intestate in respect of the personalty; and an executor is in privity with his testator to the extent to which, by the terms of the will, he succeeds to the position of the testator.[1] Whether an administrator de bonis non is in privity with his predecessor, the executor or administrator, is a point of conflict among the authorities. The weight of authority is probably in the negative.[2]

We have already remarked that judgments are only conclusive of matters essential to the decision; but it often becomes a question of difficulty to determine the proper application of the rule. It seems, however, in the case of domestic judgments that the rule is not to be taken strictly, as applicable only to the main question in dispute, but that the judgment is conclusive also of such matters, actually passed upon, as may have become essential to the decision of the action.[3]

It has been a point of great discussion whether a judgment is conclusive of matters which might have been adjudicated but which, in point of fact, were not put in issue; but, according to the weight of authority and the better doctrine, the judgment operates only upon such matters as were necessary parts of the cause of action. There is no estoppel, therefore, except in respect of such matters as the parties to the cause were bound to litigate in it; and the parties are not bound to litigate anything except the single cause of action tried.[4]

But there is a wide difference between the case where a party omits to introduce evidence of one of several demands, or of a counter demand, and a case where he fails to produce sufficient evidence to sustain his position. In the latter case an estoppel will arise from the judgment.[5]

It is well settled at the present day that an action cannot be maintained to recover money paid under a judgment by reason of evidence subsequently discovered showing that the judgment should never have been rendered.[6] But it has been

[1] Chapter 8. [2] Ib. [3] Ib. [4] Ib.
[5] Ib. [6] Ib.

held that money obtained by extortion, under the color of legal process, may be recovered.[1]

It is a general principle applicable to the domestic judgments of superior courts, though not universally accepted, that there can be no impeachment of the jurisdiction of the court in which the judgment in controversy was rendered, unless it appear from the face of the record that the court had not acquired jurisdiction.[2] In the case of the superior courts proceeding according to the course of the common law, the jurisdiction will be conclusively presumed in the absence of anything in the record showing that the court had *not* obtained jurisdiction.[3] In cases where these courts proceed otherwise than according to the common law, there is some conflict whether the same presumptions will be raised; but most of the courts hold that in such cases judgments are reduced to the grade of judgments of the inferior courts, so far as any presumptions respecting jurisdiction are concerned.[4]

Judgments of inferior courts may be impeached for want of jurisdiction, except, possibly, in certain cases where there has been an adjudication of jurisdiction by the inferior court on general appearance of the defendant.[5]

According to the weight of authority, domestic judgments of the superior courts are not liable to impeachment on the ground that they were obtained by fraud, except in the sense of collusion, corruption of the court or of counsel, or the like case.[6] Nor is it probable that judgments of inferior courts may be impeached for fraud in the cause of action; but judgment obtained by fraud at the trial would make a different case.[7]

Of domestic and foreign judgments in rem, the most familiar example is found in the adjudications of the Admiralty in matters of prize. These are conclusive against all the world both of the change of property, and of the fact for which the condemnation was pronounced.[8] So of the condemnation and

[1] Chapter 3. [2] Ib. [3] Ib. [4] Ib.
[5] Ib. [6] Ib. [7] Ib. [8] Chapters 4, 5.

acquittal of goods in the Exchequer, so far as the judgment is concerned.[1] So of decrees establishing pedigree,[2] decrees in matters of marriage and divorce,[3] decrees of the Court of Probate,[4] orders in some of the states concerning the settlement and removal of paupers,[5] decrees appointing tutors to minors,[6] and judgments confirming the reports of commissioners of boundary.[7] But probably only judgments in prize cases are conclusive inter omnes in regard to the findings and grounds of decision.[8]

Foreign judgments in rem have, from an early period, been regarded with high favor by the courts; they are held equally conclusive with the judgments of domestic courts in respect of the merits of the matter adjudicated.[9]

In respect of both foreign and domestic judgments in rem, the same rules prevail concerning the extent and operation of the judgment itself (as distinguished from findings and grounds), as in the case of domestic judgments in personam, with the exception that they bind all persons, and not merely the actual parties and their privies.[10] But the jurisdiction is, in all cases probably, open to inquiry.[11]

Until within a recent period the position to be accorded to judgments in personam, rendered in foreign nations, was a matter of much doubt and fluctuation in the courts of England;[12] but it has finally been settled that the judgments of foreign and colonial courts of competent jurisdiction are conclusive and unimpeachable upon the merits.[13] The doctrine is not yet altogether settled in America, but the tendency of authority is in the same direction.[14]

In regard to judgments rendered in courts of the sister states of the Union, the matter was made the subject of a constitutional provision, which declares that full faith and credit shall be given in each state to the public acts, records, and judicial

[1] Chapters 4, 5. [2] Ib. [3] Ib. [4] Ib. [5] Ib.
[6] Ib. [7] Ib. [8] Ib. [9] Ib. [10] Chapter 5.
[11] Ib. [12] Chapter 6. [13] Ib. [14] Ib.

proceedings of every other state. At first, however, this provision was generally construed as meaning merely that judgments of the sister states were to be regarded as prima facie evidence of their correctness.[1] But this doctrine was soon overruled by the Supreme Court of the United States; and it was there decided that the meaning of the constitutional provision, and of the act of Congress passed to carry the same into effect, was that the judgments of each state should be received as equally conclusive in every other state, as in the state in which they were rendered.[2]

Judgments in personam of foreign countries are liable to impeachment for want of jurisdiction; for they are not regarded technically as records.[3] Judgments of courts of the sister American states are regarded by most of the courts as record evidence, and entitled to much of the high consideration due to records of the domestic judgments. But it is agreed that parties and privies are not estopped to inquire into the court's jurisdiction, though the record sets out facts which if true would be sufficient to give jurisdiction to the tribunal.[4]

Jurisdiction over non-residents cannot be acquired so as to entitle the judgment to effect beyond the state in which it was rendered, without personal notice to the defendant within the state, or appearance by him in the suit; and legislative acts declaring that judgments may be rendered in any other way, as in the case of foreign attachments, have no extra-territorial effect. The judgment is a nullity when proceeded upon in personam in any other, or even in the same, state.[5]

It is settled that judgments of the sister states may not be impeached at law for fraud in obtaining them or in the cause of action;[6] but there is some conflict whether proceedings upon such judgments may be restrained in chancery.[7] The question has never received an authoritative answer from the Supreme

[1] Chapter 6. [2] Ib. [3] Ib. [4] Ib.
[5] Ib. [6] Ib. [7] Ib.

Court of the United States. Fraud in obtaining judgment is a proper ground for impeaching judgments rendered in a foreign country.[1]

The doctrine of merger is held inapplicable to judgments rendered in foreign nations; and the plaintiff may therefore sue de novo in the domestic courts if he desire.[2] A different rule obtains in respect of the judgments of the sister American states. As these have the force of domestic judgments, the law of merger prevails, and the plaintiff, if he sue at all in another state, must bring his action upon the judgment.[3]

The relation of privity does not exist between administrators appointed in different states or countries; and therefore a judgment against a foreign administrator cannot be an estoppel against a co-administrator acting in the state of the forum; but it has been said to be otherwise in the case of an executor in one state and a succeeding administrator de bonis non in another.[4]

The authorities are in conflict upon the question whether judgments of the sister states of inferior jurisdiction are embraced within the language of the Constitution and act of Congress.[5] The question has never gone to the Supreme Court of the United States. The jurisdiction of such courts, however, is subject to impeachment except perhaps where there has been, between citizens of the sister state, an adjudication upon the point.[6]

The second principal division of estoppel is denominated estoppel by deed. The law declares that no man shall be allowed to dispute his own solemn deed.[7] The same rule prevails too, as in the case of estoppels by judgments in personam, that the effect of the estoppel is limited to parties and those claiming under them. The conclusion must be mutual; and strangers are not bound by, and cannot take advantage of, the

[1] Chapter 6. [2] Ib. [3] Ib. [4] Ib.
[5] Ib. [6] Ib. [7] Chapter 7.

estoppel.[1] And the rule is also to be understood with the qualification that the parties are only affected in the character in which they executed the instrument.[2] The parties, however, in order to raise this estoppel, must be competent to contract; and hence there can be no estoppel by deed against a married woman not sui juris, or an infant.[3]

Of the further limitations of the doctrine the following should be observed: 1. The deed must be valid; a void deed cannot create an estoppel except perhaps in certain cases where its invalidity depends upon some external fact notice of which cannot be imputed to the party alleging the estoppel. 2. The deed does not work an estoppel in matters collateral. 3. If the instrument be a deed-poll, the estoppel in general applies only against the party executing, except in the case of leases. 4. Estoppel against estoppel sets the matter at large; as where the deed is encountered by a later one intended to discharge or modify the first.[4] 5. And there is no estoppel concerning any particular allegation where the deed contains other clear statements at variance with it.[5]

Recitals strictly speaking are the preliminary statements of such deeds, agreements, or matters of fact as are introduced to explain the reasons for the execution of the deed; but the term is also employed to designate any allegation in the instrument.[6] Particular and definite recitals alone work an estoppel.[7] There is no conclusion if the allegation is made in a general and indefinite manner.[8]

The subject of title by estoppel, or estates by estoppel, is the most extensive branch of estoppels by deed. Such a title arises in general terms where a grantor without title makes a lease or conveyance of land by deed with warranty, and subsequently, by descent or purchase, acquires a title to the premises. In such a case the after-acquired title 'inures' by way of estoppel to the benefit of the grantee and his privies.[9]

[1] Chapter 8. [2] Ib. [3] Ib. [4] Chapter 9. [5] Ib.
[6] Chapter 10. [7] Ib. [8] Ib. [9] Chapter 11.

By the early common law the feoffment, fine, common recovery, and lease possessed the efficacy of actually passing and transmitting all future estates.[1] But in conveyances of the present day this result is not so fully accomplished, except perhaps in the case of leases.

The rule in the case of leases by deed is that where no interest passes, by reason of the fact that the grantor possesses none, an estoppel arises in relation to any future estate acquired by him, and the estate inures to the grantee; but if an interest passed by the lease, no estoppel will arise in relation to future estates, and the lessor in such cases may set up the new interest and eject the lessee.[2]

In modern times the doctrine that after-acquired interests inure to the grantee of one whose actual title was not sufficient for his grant, holds good even without a warranty, provided it appear from the deed itself that the grantor intended to convey and the grantee expected to receive a particular estate greater than the grantor possessed.[3] In case a warranty is inserted, the effect upon future estates acquired by the grantor will depend upon the nature of the grant and of the warranty.[4] In some states, for example, it is held that the warranty cannot enlarge the estate granted; and hence, that in a quitclaim of the grantor's right, title, and interest, with general warranty, the grantor will not be precluded from setting up against his grantee any subsequently acquired estate.[5] But in other states it is held that the warranty may be more extensive in operation than the grant.[6]

The estoppel, however, in these cases is a mere rebutter, given to prevent circuity of action, and arises from the warranty. If it were not permitted, and the grantor were allowed to recover the land from the grantee upon acquiring the future interest, the grantee would in turn be entitled to recover the value of the land from the grantor by an action upon the warranty.

There has been much controversy whether the general war-

[1] Chapter 11. [2] Ib. [3] Ib. [4] Ib. [5] Ib. [6] Ib.

ranty in a grant in fee operates directly to transmit future interests, so as to defeat the claim of an innocent purchaser for value after title acquired, in a contest with the first grantee. The true rule seems to depend on the situation of the grantor when he made the first grant; if he had possession and transferred it, the title of the first grantee should prevail; but on the contrary if the grantor, not having possession when he executed the first deed, had possession when he made the second conveyance, the second grantee should prevail.[1]

The last rule which we notice under estoppels by deed is that concerning the release of dower. By this act of releasing dower, the widow of the grantor is estopped to set up any claim of dower in the premises granted.[2] But this estoppel does not arise without a proper release, even though the wife unite with her husband in the granting part of the deed.[3] It is immaterial, however, whether the release is made in the same deed with the husband's, or in a separate deed, and at a different time.[4] And it seems that a married woman who releases dower in a deed made in fraud of her husband's creditors, is estopped to claim dower against a purchaser for a valuable consideration from the grantee.[5]

This brings us to the third division of estoppel, to wit, estoppel in pais, ancient in name, but in its present manifestations of so recent growth, that to call it modern would scarcely tell the truth; it is still taking on new forms, from time to time. We have divided this subject into Estoppel by Contract, and Estoppel by Conduct. Under the first head we have two classes of cases: first, a class in which the estoppel arises by reason of the fact that the parties to the contract have actually or virtually agreed to treat some fact as settled specifically; secondly, a class in which the estoppel arises upon the legal effect of the performance of the contract.

Under the first class we have (inter alia) for particular con-

[1] Chapter 11. [2] Chapter 12. [3] Ib. [4] Ib. [5] Ib.

sideration, the right of a corporation to defeat its contracts by showing that they are beyond its powers, in regard to which the general rule is that if the contract was wholly ultra vires, the corporation cannot be estopped to show the fact; whereas, if it had power to make the contract, but some unauthorized act was done by it in the transaction, or some requirement of the law was omitted, without the knowledge of the other party, an estoppel to set up the fact may arise.[1] For further consideration under this class we have the rule that acknowledgment of receipt of consideration in a written contract, even under seal, is not conclusive in ordinary cases;[2] also that the ordinary acknowledgment of receipt of a commodity in a bill of lading is not conclusive.[3] But the acknowledgment in either case may become binding in favor of a third person properly acting upon it.[4]

Acceptance of a bill of exchange is a conclusive admission of the genuineness of the drawer's signature, at least in favor of a bona fide holder for value who has taken the bill after the act of acceptance.[5] And the indorsement of a bill or note precludes the party from denying the genuineness of any of the prior signatures.[6]

Acceptance, however, does not preclude the acceptor ordinarily from denying the genuineness of any other signature than that of the drawer, not even that of the payee, though it may have been upon the paper when it was accepted.[7] But if the drawer put the bill into circulation bearing a forged indorsement of the payee, or bearing the name of a fictitious payee indorsed in the drawer's hand, the acceptor will not be permitted to escape liability by alleging that his admission extends only to the signature of the drawer.[8] This admission of genuineness extends only to the signature itself, and does not embrace the handwriting of the body of the bill; the party may show that there has been a forgery in this part of the paper.[9]

An exception has been made to the rule that an acceptor

[1] Chapter 14. [2] Chapter 15. [3] Ib. [4] Ib. [5] Chapter 16.
[6] Ib. [7] Ib. [8] Ib. [9] Ib.

may not dispute the handwriting of his correspondent, the drawer, where the holder has taken the bill before acceptance; in such a case it is said that the acceptor may allege that the drawing is a forgery, if the forgery be discovered within a reasonable time.[1] This doctrine puts the rule strictly upon grounds of estoppel. And the same principle is declared to prevail when the duty of inquiry rests upon the holder.[2]

It is held too that one who receives as genuine, from an innocent party, paper purporting to be his own, which, however, has in fact been forged, will not be permitted upon a late discovery of the forgery to shift the loss upon the other party.[3]

It has been held that a person selling commercial paper as a chattel does not warrant its genuineness; but a contrary doctrine has been maintained with convincing force, and the weight of authority is that way.[4]

The execution of a negotiable promissory note payable to a party named, amounts to a conclusive admission of the present capacity of the payee to indorse the paper; and the same is true of the acceptance of a bill of that character.[5] But the admission extends only to the payee's capacity at the time the paper was made or accepted.[6] So too by indorsing commercial paper the party conclusively admits the capacity of all prior parties to the security.[7]

Whether the certification of a bank check as 'good,' by the teller or cashier of a bank, operates to preclude the bank from showing that the drawer had no funds on deposit at the time has been a subject of conflicting opinion. The doctrine held in New York and elsewhere is that the correctness of the certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly; and that if the presenting party relies upon its accuracy, and is caused to forego a remedy, the certifying bank will be held to its statement.[8] And though the authority of the teller or cashier be expressly

[1] Chapter 16. [2] Ib. [3] Ib. [4] Ib. [5] Ib. [6] Ib.
[7] Ib. [8] Ib.

limited, to the knowledge of the holder of the paper, to certifying in case of funds, the existence of funds is treated as an external fact which the holder is not bound to ascertain.[1] In Massachusetts, however, it has been held that the certification of checks is not within the inherent powers of the teller so as to bind the bank to pay the amount.[2]

The transfer of a negotiable bill or note by an indorser, after his liability has been fixed, amounts to a representation of his liability, and estops the party from alleging a want of demand and notice after the transfer.[3]

Under the second class, where the estoppel arises upon the legal effect of the contract, we have a subject denominated 'Estoppel arising from taking Possession;' the most important branch of which is the estoppel of a tenant to deny his landlord's title.

The tenant's estoppel of the present day is of modern origin, and rests upon a ground quite different from that of the estoppel as known to former times. In the time of Coke, and afterwards, the estoppel arose only in the case of a sealed lease, and then only against the party sealing; so that there was no conclusion upon the tenant in the case of a deed-poll or verbal lease.[4] At the present day, however, the estoppel arises by reason of permissive possession, and lasts until a surrender. It is therefore immaterial whether the lease be under seal or in parol. The seal is no longer held the foundation of the estoppel.[5]

As the relation of landlord and tenant is one of contract, it follows that the same rules prevail in relation to the competency of parties as in the case of estoppels by deed. Like other contracts a lease binds only parties sui juris; hence persons under disability, not being bound by the contract, cannot be estopped to deny its force.[6]

The doctrine of privity prevails here also; and all persons claiming under the tenant are equally estopped to deny the title of the original lessor.[7]

[1] Chapter 16. [2] Ib. [3] Ib. [4] Chapter 17.
[5] Ib. [6] Ib. [7] Ib.

But while a tenant is ordinarily estopped to deny his landlord's title, whether by setting up an outstanding title or in any other way, the rule has several qualifications. One of these arises where a person in possession has made an acknowledgment of tenancy through mistake or through the fraud of the lessor; in such a case the estoppel is removed by proof of the facts.[1] And proof may always be given of the circumstances under which a tenancy or an attornment was made.[2]

Another important qualification of the rule is that the tenant may always show that his landlord's title has expired.[3] This may be done, for example, by showing that the tenant has been evicted by title paramount.[4] And according to the more general doctrine in America, it is sufficient to show a constructive eviction.[5]

It has been a matter of conflict among the authorities whether the tenant may contest the title of his lessor by merely showing that he was already in possession of the premises when he took the lease; and although it has been maintained with great force that there is no estoppel in such a case, the weight of authority is the other way.[6]

The estoppel may also be removed by disclaimer brought to the notice of the landlord. By such an act the title of the tenant becomes adverse; and the lessor may eject him at once from the premises. And if he fail to do so before the period of limitation has expired, the tenant may then set up his title acquired by adverse possession.[7] The same doctrine applies to the case of mortgagors in possession, trustees, and persons in the like situations.[8]

The tenant may also purchase the property of his landlord, and thus extinguish the tenancy.[9] But if he should be bound to pay taxes and neglect to do so, he could not buy in the title at tax sale and set it up against the lessor.[10]

The rule is subject to the further qualification, that the tenant

[1] Chapter 17. [2] Ib. [3] Ib. [4] Ib. [5] Ib. [6] Ib.
[7] Ib. [8] Ib. [9] Ib. [10] Ib.

may show that he was let into possession under a title from which the landlord's title was derived.[1] He may also show that one to whom he has paid rent under an attornment has no derivative title from the lessor.[2]

When, however, none of these exceptions are available to the tenant, the estoppel will ordinarily prevail, even though the tenancy be created by a deed which may show that the landlord possessed no legal estate in the premises.[3] And the estoppel prevails against one in possession of premises under a mere license.[4] It has also been held to arise where the tenancy has been created by operation of law.[5]

A relation similar to that of landlord and tenant is held, in equity, to exist between the vendor of real estate and the purchaser, before the payment of the purchase-money; in such a case the purchaser will not be permitted to escape payment by disputing the title of the vendor. So of one entering under a contract for the purchase of land.[6]

The relation of bailor and bailee gives rise to an estoppel like that in tenancy.[7] The general rule is that one who has received property from another as his bailee, agent, or servant, must restore the same before he will be permitted to dispute the former's title to it. But the bailee has no better title than his bailor, and consequently if a person entitled to the property as against the bailor claims it, the bailee will have no defence against him; and in such a case, in an action by the bailor, the bailee may set up the jus tertii.[8] The estoppel ceases when the bailment upon which it is founded is determined by what is equivalent to an eviction by title paramount.[9] It is not enough that the bailee has become aware of the title of a third person; nor is it enough that an adverse claim is made, so that he may be entitled to relief under an interpleader. The bailee can only set up the title of another against his bailor when he acts upon the asserted right, title, and authority of that person.[10]

[1] Chapter 17. [2] Ib. [3] Ib. [4] Ib. [5] Ib. [6] Ib.
[7] Ib. [8] Ib. [9] Ib. [10] Ib.

A similar rule applies to the case of assignees and licensees of patents, and persons in employment generally. Persons who have acted under a patent and received profits from its use, will not be permitted to deny the validity of the patent in an action by the patentee to obtain an account.[1] The principle is also seen in the case of an agent, who, having collected a debt for his principal, must pay the money over to his principal regardless of the question whether the debt was legally due.[2]

Executors and administrators also are estopped to set up adverse claims to the property of the estate which has come into their possession; but, in cases of mistake, they may amend their inventories and leave out property which had been embraced therein and recognized as property of the estate, if no prejudice will result to the parties in interest.[3] In like manner devisees for life will be estopped by taking possession from saying that the testator had no sufficient estate to create the interest.[4]

This brings us to the division called Estoppel by Conduct, in which the estoppel may arise without regard to the existence of any contract between the parties. Several classes of cases fall under this head, the typical and most important class being estoppel arising from misrepresentation. The general rule in regard to that is, that where a person by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as to change his position, he will be estopped to aver against the latter a different state of things.[5] In order to this estoppel it will be necessary that the following facts actually or virtually concur: 1. There must have been a false representation concerning material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that it should be acted

[1] Chapter 17. [2] Ib. [3] Ib. [4] Ib. [5] Chapter 18.

upon. 5. It must have been acted upon to the damage of the party acting.[1]

In all ordinary cases the representation must have reference to a present or past state of facts only; it should not look to future events or to pure matters of law.[2] It must have been plain and certain and such as would naturally lead to the action taken.[3]

This estoppel may arise from misleading passive conduct or concealment as well as from active conduct.[4] A party who negligently stands by and allows another to contract on the faith and understanding of a fact which he can contradict may not afterwards dispute the fact in an action between himself and the person whom he has assisted in deceiving. Or as the principle has been forcibly stated in the Court of Chancery, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to keep silent.[5]

If, however, the party's silence be not the result of intended fraud or of misleading negligence, his conduct will not raise an estoppel;[6] and forgetfulness of one's rights has sometimes been held excusable.[7] But such a case should not be the result of gross negligence.[8]

In this case of estoppel by conduct only parties and their privies are bound by the representation, and only those to whom the representation is made, and their privies, may take advantage of the representation.[9]

It has been said that the doctrine of estoppel in pais has no application to married women or to infants;[10] but the weight of authority seems to favor the doctrine that both infants of years of discretion and married women may preclude themselves from denying the truth of their representations in the case of pure torts. Where, however, the conduct or representation is so connected with matter of contract that the action must 'sound in contract,' no estoppel arises.[11]

[1] Chapter 18. [2] Ib. [3] Ib. [4] Ib. [5] Ib.
[6] Ib. [7] Ib. [8] Ib. [9] Ib. [10] Ib. [11] Ib.

Many cases of boundary have been decided upon the party's knowledge or ignorance of the facts represented. The rule in some states is that an untrue representation concerning the location of a boundary line, in order to estop the party making it, must have been made with knowledge of the location of the real line. When so made to and acted upon by a party ignorant of the true line, the former will not be permitted to deny the truth of his statement against the objection of the latter.[1] In other states long acquiescence in the wrong boundary line has been held sufficient.[2] The former cases are more in accord with the nature of this estoppel.[3]

In respect of the intention that the representation should be acted upon, the term 'wilful' was at first connected with it as though it were an essential part of the intention; but this doctrine was soon modified and the principle settled that, if the representation was such as to lead an intelligent person to infer an intention and it was voluntary, it is sufficient to work an estoppel.[4]

The rule that the representation must have been acted upon, in order to the estoppel, is fundamental. It proceeds upon the ground that the party would unjustly be put to damage by allowing the truth of the representation to be disproved. But it has been held in cases of authority that specific proof of damage is not required, and that it is sufficient if it may be fairly presumed that damage did result.[5]

A second kind of estoppel by conduct may arise, it seems, by negligence without any representation in the proper sense of that term; but according to the better view negligence can never generate an estoppel except where the party to be estopped owes a duty to the party claiming an estoppel, and where, further, the negligence was in, or in immediate connection with, the change of position, and the proximate cause of such change.[6]

[1] Chapter 18. [2] Ib. [3] Ib. [4] Ib. [5] Ib. [6] Chapter 19.

Another kind of estoppel by conduct may arise by a party to a contract or transaction inducing the other to act in the belief that the former will waive certain rights he might otherwise maintain against the latter. This estoppel does not consist in misrepresentation by the party to be estopped, nor does it require that the opposite party should be ignorant of the facts. Waiver by an underwriter of the terms of an insurance contract is an example; encouraging a licensee to expend money on one's premises in the belief that the former will thereby acquire rights or privileges is another.[1]

This completes estoppel proper, in substantive law, and brings us to what may be called quasi-estoppel. A party will not be permitted to assume inconsistent positions; and where one has an election between inconsistent courses of action he will be confined to that course which he first adopts.[2] Accordingly where a party takes a beneficial interest under a will, he will not be allowed to contest the validity of the testament.[3] So if a person assist in procuring the passage of an unconstitutional act by the legislature for his own benefit, and proceed to act upon it, it is held that he will not afterwards be allowed to deny its constitutionality.[4] So, too, if a party bring a suit upon a contract or purchase, or with knowledge of the facts receive money upon the same, he will be held to have conclusively affirmed its validity.[5]

Lastly, of estoppels in the adjective law. Whether the estoppel of a deed or record should be pleaded or not to be available has been a matter of doubt at the common law; but the prevailing and better opinion at the present time is that it is conclusive in evidence though not pleaded. This is certainly true in case the party claiming the benefit of it has had no opportunity to plead it.[6]

It is well settled at common law that the facts constituting an estoppel in pais need not be pleaded; but there have been

[1] Chapter 20. [2] Chapter 21. [3] Ib. [4] Ib. [5] Ib.
[6] Chapter 22.

statutory regulations upon the whole subject in some of the states.[1]

The proper general issue, at common law, to an action upon the judgment of a court of record is nul tiel record, both in the case of domestic judgments and of the judgments of a sister state of the Union.[2] But nil debet may be pleaded to a judgment rendered in a foreign country.[3] The practice in declaring upon a judgment is to allege generally that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned; but in pleading or replying a judgment as an estoppel to an action or allegation it should be made to appear that the precise point now in question was brought in issue in the preceding action and there determined.[4]

In the case of judgments of foreign countries, or of inferior courts whether domestic or foreign, the jurisdiction of the court must be proved; and in all cases it must appear that the judgment was final and rendered upon the merits of the question.[5]

The estoppel of a deed, as has been intimated, is ordinarily removed by proof that the instrument is not valid;[6] or when it is introduced in evidence in collateral matters.[7] The same is true when it is encountered by another deed inconsistent with it and intended to discharge or modify it;[8] or if other matters appear in the instrument which explain, modify, or overturn the recital relied upon as an estoppel.[9]

The facts to be proved in order to raise an estoppel in pais by misrepresentation have already been referred to.[10] It has been held that estoppel in pais when applied to real estate is available only in equity, and not at law;[11] but a contrary rule prevails in many states.[12]

Parties are not permitted to take inconsistent positions in the conduct of litigation. And the principle upon which a party is

[1] Chapter 22. [2] Chapter 23. [3] Ib. [4] Ib.
[5] Ib. [6] Chapter 24. [7] Ib. [8] Ib.
[9] Ib. [10] Ante, p. 26. [11] Chapter 25. [12] Ib.

estopped by his course of action in the trial of a cause seems to be that a prejudice would result to the opposite party if a change were to be allowed by the court; where no prejudice would arise by a change of position, there is no rule of law against permitting one.[1]

[1] Chapter 26.

PART I.

RIGHTS ARISING FROM ESTOPPEL BY RECORD.

PART I.

RIGHTS ARISING FROM ESTOPPEL BY RECORD.

CHAPTER I.

PRELIMINARY VIEW: THE RECORD.

We have seen that the term 'record' signifies (1) the legislature's roll, (2) the judgment roll of a court of competent jurisdiction; and that estoppel by record is a right conferred or fixed by record. But the record is attended with another twofold estoppel; the roll as a memorial creates one kind of estoppel, the fact enrolled another. To the first, the roll as a memorial, attention is now directed.

Of estoppel arising from legislative records it is only necessary to say that all persons are bound. There can be no such thing as individual parties to such records; all the world are parties, and all are therefore bound so long as the record remains unchanged. Estoppel arising from judicial records requires closer examination. This concerns not merely record evidence arising from enrolment, but also the conclusiveness of judgments generally. Strictly speaking, this estoppel may perhaps embrace only the effect of judgments of the domestic courts technically of record; but it has in fact been expanded so as to include judgments of all courts of justice, whether of record or not of record in the technical sense, and those of other states and countries.

In one respect this estoppel is like the estoppel arising from a legislative record; as a memorial simply it has conclusive

effect against all the world. No one, whether party, privy, or stranger, is permitted to deny the fact that the proceedings narrated in the record took place,[1] or the time when they purport to have taken place,[2] or that the parties there named as litigants actually or constructively participated in the cause, or that judgment was given as therein stated;[3] unless in a direct proceeding instituted for the purpose of correcting or annulling the record.[4]

So far, however, as the record purports to declare rights and duties, its material recitals[5] import absolute verity indeed, but this only, in ordinary cases, between the parties to it (including those who claim under the parties), and then only in collateral proceedings.[6] The rights of strangers are not affected; strangers can neither be bound by nor take advantage of recitals in the record.[7] Indeed, even between parties and privies the recitals of a judicial record of another state or country or of an inferior domestic court[8] in respect of jurisdiction are but prima facie evidence; and it has been adjudged in New York that the same is true in that state of recitals of jurisdictional facts of even the superior domestic courts.[9] On the other hand, the record of a judgment in rem (a term to be explained later), apart from findings and recitals of jurisdiction, is conclusive of the rights of all persons.

[1] Reed *v.* Jackson, 1 East, 355.

[2] Floyd *v.* Ritter, 56 Ala. 356. So the clerk of a court may bind himself in collateral proceedings by an entry of record concerning his own acts. Thompson *v.* Building Assoc., 23 Kans. 209.

[3] Morgan *v.* Muldoon, 82 Ind. 347, 355; Scott *v.* Ware, 64 Ala. 174, 183; Taylor *v.* Means, 73 Ala. 468; Central R. Co. *v.* Smith, 76 Ala. 572, 578.

[4] See Rogers *v.* Beauchamp, 102 Ind. 33, 36, and Exchange Bank *v.* Ault, ib. 322, in regard to such proceedings.

[5] Stipulations filed with the record of a cause may be binding in regard to the facts recited therein as much as if they were part of the very record. Strong *v.* Stevens Point, 62 Wis. 255.

[6] A finding of prescription or of reputation, as in regard to the existence of a ferry or a fishery, is prima facie evidence against strangers, but nothing more. Reed *v.* Jackson, 1 East, 355; Neill *v.* Devonshire, 8 App. Cas. 135, 147; Pim *v.* Curell, 6 Mees. & W. 234; Hemphill *v.* McKenna, 8 Ir. L. R. 43, 51, 52; Carnarvon *v.* Villebois, 13 Mees. & W. 313.

[7] Perhaps an admission of record might be made for the benefit of a third person, or with a view to his acting upon it, so as, when materially acted upon, to become conclusive. Dahlman *v.* Forster, 55 Wis. 382.

[8] Mulligan *v.* Smith, 59 Cal. 206, 233.

[9] Ferguson *v.* Crawford, 70 N. Y. 253. See chapter 3, § 4.

The term 'record,' it may be remarked, had no such sense originally as that applied to it in modern times. It did not at first signify enrolment or writing of any kind; as applied to the courts it signified proof, in manner prescribed by law, of the proceedings of the king's superior courts, which proof was furnished by witnesses bearing oral testimony of the facts. But owing to the dignity attached to the proceedings of the king's courts, and apparently to the solemn manner in which the same were proved, the 'record' of those courts (i. e. the due report of their proceedings) was held to import absolute verity; a character not, except in a partial degree, accorded to testimony concerning the proceedings of the inferior courts. From this circumstance it came to be said in reference to the conclusiveness of the evidence, at least as early as the twelfth century, that only the king's courts 'had record';[1] an expression which in modern times, still used as then only of the superior courts, has come to mean that such courts alone have of right enrolment of their proceedings under seal.

Using the term now in the modern sense, it remains to say that the record, though to be received between the parties and their privies as conclusive evidence, in proceedings not begun on the one side or the other to impeach it, may always be corrected, as has been intimated, by a direct proceeding instituted

[1] History of Procedure in England, 319. In the Dialogue of the Exchequer, a work of the king's treasurer, Richard, Bishop of London, written in the year 1177, it is said of the Exchequer, 'Habet enim hoc commune cum ipsa domini Regis Curia in qua ipse [i. e. rex] in propria persona jura decernit quod nec *recordationi* nec sententiæ . . . licet alicui contradicere.' Stubbs's Select Charters, 176 (2d ed.). The record here referred to consisted of short tax rolls made up by the fiscal officers of the king in the spring and fall of each year; the word being used in the modern sense of enrolment. On the 'record' of the King's Court (the King's Bench of modern times) a century later, a case of Mich. 18 Edw. 1 may be referred to. The case was an assize by writ of certiorari between William de la C. and Richard de P. and Margaret, his wife, concerning certain land in W., which the defendants claimed had been adjudged to them in a previous trial by recognition. Whereupon 'scrutatis *rotulis* [short entries or memoranda of proceedings of the court] compertum est quod predicta recognicio rite facta fuit in Curia domini Regis et contra hujusmodi recognicionem sic in curia factam non jacet inquisitio patriæ ad verificandum contrarium. Consideratum est quod predictum *recordum* stet in suo robore, et Ricardus et Margareta sine die.' These rolls, it may be remarked, were not themselves under seal.

for the purpose. Thus, if facts are erroneously inserted, the court may order an erasing of them or such a change as will make them conform to the truth; and if material facts have been omitted, the court may order that they be inserted.[1] Any evidence which would be proper in an ordinary proceeding for the purpose of correcting a written instrument would doubtless be admissible in such a case. But the evidence in support of the desired change in the record should be very strong.

It may be observed that, before the record has been extended, the docket entries have the same force of conclusiveness as the later record. Indeed, the docket is the record until the final enrolment is made.[2] In either case, however, facts that do not appear by the record, if necessary to establish the subject-matter of a finding, or the grounds upon which the judgment proceeded, may be supplied by evidence ab extra, even in a collateral proceeding; a proceeding, that is to say, not instituted to correct or enlarge the record.[3]

Thus far of the record as a memorial. The estoppel arising from or fixed by the fact enrolled is now to be considered. This is of far greater importance; it is the estoppel of a judgment.

The first inquiry now must be, what is the legal conception of a judgment? Does a judgment necessarily create an estoppel? The general answer is, yes, if it results in res judicata; no, if it does not. The inquiry concerning a judgment as an estoppel turns then upon the meaning of the last-named term; to which attention will now be directed.

[1] Balch *v.* Shaw, 7 Cush. 282; Willard *v.* Whitney, 49 Maine, 235. See Rogers *v.* Beauchamp, 102 Ind. 33; Exchange Bank *v.* Ault, ib. 322.

[2] Read *v.* Sutton, 2 Cush. 115. See Sayles *v.* Briggs, 4 Met. 421, 424.

[3] Sturtevant *v.* Randall, 53 Maine, 149; Chase *v.* Walker, 26 Maine, 555; Dunlap *v.* Glidden, 34 Maine, 517; Parker *v.* Thompson, 3 Pick. 429, 434; Packet Co. *v.* Sickles, 5 Wall. 580. See post, p. 87.

CHAPTER II.

PRELIMINARY VIEW: RES JUDICATA.[1]

§ 1. *Meaning and Use of the Term.*

IN the preceding chapter we have spoken of the effect of record evidence in its general features; in its testimony, that is to say, to any and to all of the enrolled proceedings of the superior courts of justice. The doctrine of estoppel by record, however, is chiefly concerned with the enrolment or record of judgments in litigated causes, and the narrated proceedings leading as necessary preliminaries to them; and that doctrine, as may be inferred from what has heretofore been stated, bears alone upon the conclusiveness of the record in litigations not instituted for the purpose of annulling or modifying the witness of the enrolment. In other words, using the technical language of the books, the record of a judgment is conclusive evidence only in collateral proceedings.

It will not be necessary to speak further of the record. The great question is, what constitutes a judgment, and what meaning and modification attach to the doctrine of estoppel as applied thereto. Now the fundamental principle concerning judgments is that an issue once determined by a court of competent jurisdiction may be relied upon as an effectual bar to any further dispute upon the same matter, whether by the parties to the litigation or by those who, termed privies, claim under them; this conclusiveness including of course as well the law[2] as the facts involved in the case. We speak of this as fundamental

[1] The expression 'res *ad*judicata,' sometimes used even by reputable writers, is Latin made to order. The Roman jurists, and their successors in Europe, say 'res judicata,' — the former always, the latter with few exceptions. See Dig. 44, 2.

[2] South Alabama R. Co. *v.* Henlein, 56 Ala. 368; Imrie *v.* Castrique, 8 Com. B. N. S. 405; S. C. L. R. 4 H. L. 414; Case *v.* Beauregard, 101 U. S. 688.

because it is the very object of the institution of courts to put an end to disputes. 'Interest reipublicæ ut litium finis sit.' This is of course true under every system of justice; it is peculiar to none. It would therefore be wide of the truth to speak of the doctrine of judgments in the English law as derived from the principles of any other system of law. On the other hand, it would be arrogant and false to assert that the principles of the English law in regard to the effect of judgments had been wholly worked out from within, regardless of that great system of law which Rome developed and gave for an inheritance to most of the continental nations of Europe, and for a light to all the world. From Rome our law has at least borrowed the convenient term 'res judicata'; to Rome let us go and see what that term signified among those who invented it.

In its most obvious and general meaning the term 'res judicata' signified at Rome, as it signifies in England and in America, that a matter in dispute had been considered and settled by a competent court of justice. The term had, however, a special meaning, which turned upon what we should call a point in pleading. In the time of Gaius, the second century, a distinction existed between the effect of judgments rendered under the native system of justice and judgments rendered in the prætor's courts. In contests tried under the former system, judgment for the plaintiff in a personal action had the effect, by way of 'novation,' of terminating the original obligation of the defendant; merging it, that is to say, as in the English law, in the higher obligation of a judgment debt. The result of this was that if the same plaintiff for any reason afterwards brought another action upon the same demand, a simple denial, such as might be called a plea of the general issue in the English law, was sufficient for the defendant. Then, when, the trial having come to an issue, the case came to be heard as we should say, the defendant in answer to the plaintiff's evidence proved the former judgment; and this, disproving the existence of the obligation or liability alleged by the plaintiff, ended the cause in favor of the defendant. The proceeding in which such a course of things took place was called 'judicium legitimum.' If the litigation occurred in the prætor's court, the effect of judg-

ment for the plaintiff was like that of judgment rendered in a country foreign to Great Britain or to the United States. Being a 'foreign judgment' no novation was deemed to have been created when the original demand was again sued upon (in Rome, it seems). The original obligation or liability therefore continuing to exist notwithstanding the judgment, it was necessary by some plea in avoidance to show that the plaintiff was not entitled to enforce his demand. For this purpose the defendant entered a plea of the former judgment, or, as it was called by the Roman jurists, an 'exceptio rei judicatæ.'[1] The proceeding in which this took place was called 'judicium imperio continens.' By the time of Justinian, the sixth century, this distinction had ceased to prevail, the rule governing in the prætor's court having become universal. No novation occurred even of judgments rendered in the courts of the city, and a special 'plea' of the former judgment was therefore the only escape from a second judgment upon the same cause of action; unless of course some new defence, such as payment, had arisen.

Concerning the nature of the judgment behind which the defendant might shield himself, it was necessary in the Roman, as it must be in every other well-founded, system of law that the subject-matter general or special of the former litigation, and the parties thereto, should be the same as in the new action, except (as for the matter of parties) that the judgment was equally available by or against those who had succeeded as privies to the rights of the original parties. The parties should also have litigated in the same character in both actions.[2] The conclusiveness of the judgment probably extended to every point necessarily decided; and it was not necessary that the former cause of action should have been the same as the second except when that cause of action was itself the subject of dispute. It was enough that the *point* in dispute was the same in the two actions.[3]

[1] The exceptio, it may be observed, was unlike our plea in confession and avoidance, in that it did not confess anything, it only avoided; and the plaintiff was still put to the proof of his demand. Sandars, Justinian, p. 475, 6th Eng. ed. Upon the subject of the text see Gaii Inst. iii. 181; ib. iv. 106, 107; Inst. Just. iv. 13, 5, and notes by Sandars.

[2] Dig. 44, 2, 14.

[3] See Dig. 44, 2, 7; ib. 44, 2, 21.

The benefit of judgments was equally available to plaintiff and to defendant. If the plaintiff had obtained judgment, he could bring an action thereon,—an actio judicati, the conclusiveness of which the defendant could not deny; if judgment had gone for the defendant, he could avail himself of the same as a conclusive determination of the question in his favor. And we have already spoken of the defence to a second suit upon the same cause of action after judgment in favor of the plaintiff.

In the English law the doctrine of res judicata depends for its effect, first, upon the nature of the proceeding in which the matter became res judicata, to wit, whether it was an action in rem or an action in personam; this is the great and most important division of the subject, and it will presently receive an explanation. Its effect depends, secondly, upon the forum in which the cause was tried, to wit, whether it was tried in the courts of the state in which it is interposed as an estoppel, or in a foreign court. In strict law the doctrine is applicable only to the judgments of domestic courts; but from motives of policy or of 'comity' it has been extended to the judgments of foreign courts of civilized countries,[1] with certain limitations which will appear in the chapters relating to foreign judgments.

The term 'in rem' had in the Roman law, from which the English law has of course borrowed it, a double signification, one as applied to the nature of a certain class of rights, the other as applied to the actions by which those rights were enforced. A right was a right in rem when it availed against all the world, thus corresponding generally to that sort of right in the English law the breach of which constitutes a tort. It was distinguished from a right in personam in that it might be infringed by anybody. The term is frequently used in the same sense by writers on the English law. Thus, a right of property is said to be a right in rem, for it avails against all the world; whoever infringes it is liable, and the right is not defined in regard to the party who may be sued until it is infringed. The term was used in the Roman law both in a literal sense, to denote a proceeding to obtain possession of a tangible thing, as a piece of land or a horse, and

[1] In one case the doctrine was extended to a decree pronounced in Algiers. The Helena, 4 Ch. Rob. 3. Per Sir William Scott.

also in an artificial sense, to indicate a proceeding to obtain or confirm an incorporeal right, as an easement. Thus, Gaius says: 'In rem actio est, cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi, aquamve ducendi, vel altius tollendi, vel prospiciendi.'[1] Ulpian's definition is this: 'In rem actio est per quam rem nostram quæ ab alio possidetur petimus; et semper adversus eum est qui rem possidet.'[2] On the other hand, a right in personam was, as it is in the English law, a right in virtue of which a certain person was bound towards another certain person to do or not to do some specified thing, in such manner that he against whom the action would be brought, in case of non-fulfilment of the obligation, was known and determined from the moment of the creation of the obligation.[3]

In regard to the *effect* of an adjudication in rem the rule, as we should expect from what has been said above, commonly at all events was 'res judicata inter partes jus facit;' 'not, it is to be observed, inter *omnes*, but inter *partes*.'[4] There would seem, then, to be no difference in this respect between a proceeding in rem and one in personam; neither binding any but parties to the litigation, and their successors in right. Certain kinds of judgment in the Roman law did, however, bind third persons, though not upon any distinction between judgments in rem and judgments in personam;[5] and the same fact reappears in modern Roman law. In a recent work[6] it is said that while generally speaking a judgment affects only the parties to the suit and their successors, it does extend 'to third parties exceptionally, as for instance in the case of the invalidity of a testament, in an indictment, in a judgment upon the status of a person, in judgments in cases of real servitudes, in joint ownerships, and in other similar instances.'

[1] Gaius, iv. 3.

[2] See Tomkins & Lemon, Gaius, p. 601. See also Inst. iv. 6, 1, Sandars; Bracton, 102. The term 'in rem' indicated, not the object, but the nature of a demand; and there could be a pactum in rem as well as in personam. Goudsmit, Roman Law, p. 248, by Gould.

[3] Goudsmit, Roman Law, p. 247.

[4] Tomkins & Lemon, Gaius, p. 275.

[5] Keller, Römische Civil Process, § 73, 4th ed.

[6] Tomkins & Jencken, Mod. Rom. Law, p. 94.

Actions in rem, in the Roman law, corresponded to rights in rem, and actions in personam to rights in personam. To this, the English law, while following the Roman nomenclature, has never been conformable. Thus, our great Romanizing writer, Bracton, could merely say, that that only was an action in rem the sole object of which was to obtain possession of a res; when the proceeding was in the disjunctive for possession *or* damages, it was an action not in rem but in personam. And those actions only were considered as in rem which were brought for the recovery of land. Actions in personam (besides the case mentioned) arose out of contract or tort.[1]

Whether there was any such difference in the time of our older writers as now prevails between judgments in rem and judgments in personam in their effect upon third persons does not clearly appear; probably there was not. There was a class of proceedings, however, which would now be called proceedings in rem that led to judgments binding inter omnes. Thus Bracton says: 'Effectus vero legitimationis probatæ hic est, quod cum semel probata fuerit et judicium pro tali reddatur in Curia Regis semper *quoad omnes* legitimus erit, nisi in probatione intervenerit fraus.'[2] Again, Littleton says: 'Where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, the tenant or the defendant may show the whole matter of record and the outlawry, and demand judgment if he [the demandant or plaintiff] shall be answered.'[3] Lastly, Lord Coke says: 'Where the record of the estoppel doth run to the disability or legitimation of the person, there *all strangers* shall take benefit of that record; as outlawry, excommenqement,[4] profession, attainder of præmunire, of felony, etc., bastardy, mulierty, and shall conclude the party though they be strangers to the record. But of a record concerning the name of the person, quality, or addition, no stranger shall take advantage, because he shall not be bound by it.'[5]

Confusion was the inevitable result of adapting the Roman

[1] Bracton, pp. 102, 102 b. Bracton fashioned and fixed the nomenclature. See Keller, Römische Civil Process, § 73, 4th ed.

[2] Bracton, p. 420, § 17. The principle is probably taken from the Roman law; Bracton no doubt found it there.

[3] Litt. Ten. § 197; Coke, Litt. 128 a.

[4] Excommunication.

[5] Coke, Litt. 352 b.

nomenclature to usages and conceptions at variance with those of Rome. It began at the outset, when the term 'real actions' was applied solely to actions for the recovery of land;[1] it grew when later, in recent times, writers and judges came to speak of proceedings in attachment as proceedings in rem in regard to the property taken; it was complete, or at least the Roman meaning was lost, when without any clear discrimination, and upon discordant views, sentences in prize and revenue causes, decrees in probate and divorce cases, judgments in questions of pedigree and legitimacy,[2] and orders relating to the settlement of paupers were lumped together and treated as adjudications in rem.[3]

One thing has been agreed with regard to these cases, and that is, that for some purposes, not well defined, the judgment is binding not merely inter partes but inter omnes. With regard to such purposes, and not upon the distinction of the Roman law, judgments conclusive generally are said to be in rem, according to the English and American law; while those which bind only the defined parties to a cause (including those who derive title under them) are in personam, though by the Roman law they might belong to the other class.

The difficulty heretofore has mainly been to ascertain some principle upon which to rest this class of judgments, so as to determine what cases fall within it. It has often been said that judgments in rem bind all persons, because all persons are deemed to be parties to them;[4] thus eliminating the supposed distinction, to a great extent, between judgments in rem and judgments in personam. The statement is true in a general

[1] Upon this subject see a learned article in the Law Quarterly Review for October, 1888, entitled 'The Terms Real and Personal in English Law.'

[2] In Pittapur *v.* Garu, L. R. 12 Ind. App. 16, an attempt was made to raise a question of blood relationship, decided in a former and different kind of suit, between the same parties, but without success.

[3] The category in De Mora *v.* Concha, 29 Ch. D. 268, C. A., prize, revenue, pauper, and probate cases, does not profess to be complete.

'The words as to an action being in rem or in personam, and the common statement that the one is binding on third persons, and the other not, are apt to be used by English [and by American] lawyers without attaching any very definite meaning to those phrases.' Blackburn, J. in Castrique *v.* Imrie, L. R. 4 H. L. 414, 429.

[4] See e. g. Croudson *v.* Leonard, 4 Cranch, 434.

sense in regard to prize, revenue, probate, and some other cases; at these all persons having civil rights depending upon the questions involved, and having a right to be heard in regard to them, are by some sort of public monition or notice warned to appear and present their claims. And this is all that the nature of the case permits; hence the judgment may well conclude all such persons, and probably all others.

Still another ground has been taken with regard to prize cases, to wit, the propriety of leaving the cognizance of such cases to courts having the more appropriate jurisdiction to try them. It is said that there would be 'very great inconvenience, amounting nearly to an impossibility, of fully investigating such causes in a court of common law;' and there would be an 'impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.'[1]

It might also be said with regard to prize and revenue cases that the question raised is an impersonal one; rights of ownership, or other property rights, have ordinarily no bearing upon the proceedings. The question to be decided is simply this, Is the property forfeit?[2]

Again, it is often said that judgments in rem determine status; and this is sometimes put, apparently, by way of explanation of their broadly conclusive effect.[3] But however convenient and useful the term, it is doubtful whether saying that a particular judgment has decided a status materially helps out any difficulty. Besides, if the term is borrowed from the Roman jurists, a new sense is given to it. Judgment of status by the Roman law was a judgment, it seems, relating to the quality of citizenship, or the want of it, as e. g. freedom, slavery, marriage. To apply the term that way[4] would be useful even

[1] The Mary, 9 Cranch, 126, 145, quoted by Holmes, J. in Brigham v. Fayerweather, 140 Mass. 411, 414. See also the grounds stated in Baxter v. New England Ins. Co., 6 Mass. 277, 300; Robinson v. Jones, 8 Mass. 536, 540; Lothian v. Henderson, 3 Bos. & P. 499, 545; Castrique v. Imrie, L. R. 4 H. L. 414, 434; and the arguments in De Mora v. Concha, 29 Ch. D. 268; s. c. nom. Concha v. Concha, 11 App. Cas. 541.

[2] See post, p. 232, note 1.

[3] See e. g. Hood v. Hood, 110 Mass. 463, 465, divorce case.

[4] See Markby, Elements of Law, §§ 168–180, 3d ed.

in the non-Roman conception of judgments in rem of the English law; for as the juridical condition of a human being within the state is a matter in which he himself is chiefly concerned, a direct adjudication thereon, in a cause to which he is actually a party, and in which his condition is the very question to be tried,[1] may justly bind all men. Upon this ground the general conclusiveness of decrees in regard to pedigree,[2] or legitimacy,[3] might well be explained; so of decrees of divorce, though only husband and wife could be parties.[4] Perhaps this would sufficiently explain the pauper settlement cases also.

It will help, however, to an understanding of this broadly conclusive character of judgments in rem to look to the purposes for which they are thus conclusive; and to this, searching examination has recently been directed both in England and in the United States.[5] As was stated above, the purposes for which a judgment in rem may be used inter omnes have not heretofore been clearly defined. It has been supposed, to a greater or less extent,[6] that not only judgments in prize causes, but judgments in revenue, settlement, divorce, and probate proceedings carried with their own general conclusiveness the same effect in respect of their grounds and any necessary findings in the cause. This, however, has now become extremely doubtful in England,[7] and in Massachusetts has, in regard to probate cases at least, been denied altogether.[8] Such grounds and findings will, if the cases referred to point aright, bind at most only the parties litigant and their privies; only findings and grounds of decision in prize causes bind inter omnes like the judgment itself. Indeed, it has been said that findings even in prize cases bind only those who were entitled to be heard;[9] at all

[1] Comp. Williams *v.* Williams, 63 Wis. 58.

[2] Ennis *v.* Smith, 14 How. 400.

[3] Bunting *v.* Lepingwell, 4 Coke, 29; Duchess of Kingston's Case, Everest & Strode, 424; Bracton, 420; ante, p. 44.

[4] See, however, Williams *v.* Williams, 63 Wis. 58, under special laws in regard to divorce.

[5] De Mora *v.* Concha, 29 Ch. D. 268, C. A.; affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541; Brigham *v.* Fayerweather, 140 Mass. 411, Holmes, J.

[6] Upon authority of such cases as Hart *v.* McNamara, 4 Price, 154, note, Magoun *v.* New Eng. Ins. Co., 1 Story, 157, and Bouchier *v.* Taylor, 4 Bro. Parl. Cas. 708.

[7] De Mora *v.* Concha, supra.

[8] Brigham *v.* Fayerweather, supra.

[9] The Mary, 9 Cranch, 126, 146;

events, the case of prize appears to be exceptional.[1] It has its peculiar effect, it has been strongly said, because the sovereign has declared that it should be so.[2]

The judgment itself, however, with all that is done in virtue of it, is agreed to be binding inter omnes[3]; and there is no difficulty in understanding this in regard to any of the cases above mentioned, to which others, indeed, might be added. One reason has already been foreshadowed; if all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly in personam, indeed, binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. Judgment that A is debtor of B is an example.[3] Such a judgment would not, however, profess to establish rights in respect of its grounds or of preliminary findings in the cause; in regard to these it is enough that the decision is binding inter partes. Indeed, the difference between judgments in rem and judgments in personam in our law, as regards their effect, appears at bottom to be only a difference of degree. In the case of proceedings leading to judgment in personam, all parties interested are generally present or duly represented in point of fact, or may well be, for they are clearly defined. In the case of proceedings leading to judgment in rem the parties

Salem *v.* Eastern Railroad, 98 Mass. 431, 439; Brigham *v.* Fayerweather, 140 Mass. 411, 413, Holmes, J. Comp. also the New York cases, holding that the facts upon which the adjudication proceeds are but prima facie evidence in other cases. Ocean Ins. Co. *v.* Francis, 2 Wend. 64; s. c. 6 Cowen, 404; Radcliff *v.* United States Ins. Co., 9 Johns. 277; post, chapter 5.

[1] De Mora *v.* Concha, 29 Ch. D. 268; Brigham *v.* Fayerweather, 140 Mass. 411.

[2] Mr. Justice Holmes in Brigham *v.* Fayerweather, supra.

[3] Candee *v.* Lord, 2 Comst. 269; Brigham *v.* Fayerweather, 140 Mass. 411, 413; Pickett *v.* Pipkin, 64 Ala. 320; post, chapter 3.

Still, the judgment in personam is not to be considered, for such a purpose, as a judgment in rem. The latter sort of judgment binds all interested persons everywhere, by force of the monition; while the former can bind only those interested persons who are defined parties, and only citizens or residents of the State and others served with process therein can be such parties. Further in regard to judgments in rem, see chapters 4 and 5.

are not defined, and it is not always true that they are present or represented in point of fact; it is contemplated that they are in point of law because on the whole it is deemed that public policy so requires.

A word more in regard to judgments in rem: It may be that a judgment is made conclusive upon all persons, by virtue of local law, which would not be so in other countries. In such a case it is clear that so far as the citizens, and probably residents,[1] of the state in which the law in question prevails are concerned, judgments there rendered[2] should be treated as binding inter omnes everywhere; for citizens, and residents to some extent, are bound by the laws of such state.[3] Again, it may be that a judgment rendered abroad operates in rem not by virtue of mere local law but under a general system of law, as e. g. one pervading the Latin states generally, which judgment would not so operate in a contest governed by the laws of England or of America. In such a case also the judgment should be treated everywhere as binding inter omnes; and that too, it seems, upon non-residents, assuming of course that proper notice or monition according to such foreign system of law has been had.[4]

Some further remark should be made in this connection about attachment in suits in personam. Attachment in such suits is often spoken of as acting in rem; but that does not mean that the title to the property attached is adjudicated so as to bind all persons. Attachment is simply resorted to in order to take the place of notice or appearance, in other words, merely to give the court jurisdiction;[5] it is a means, and not an end. The

[1] Comp. Rousillon *v.* Rousillon, 14 Ch. D. 351; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155.

[2] And possibly rendered anywhere, in causes between the citizens of such state.

[3] Cases in note 1, supra; Hood *v.* Hood, 11 Allen, 196.

[4] In Castrique *v.* Imrie, L. R. 4 H. L. 414, Lord Chelmsford said that the rule was that a proceeding in a foreign court to enforce a maritime lien, which by the law of that foreign country, and of all foreign codes founded upon the Roman law, was a proceeding in rem, though not so recognized by the law of England, must be so treated there. Comp. The Mecca, 6 P. D. 106.

[5] This is all that is meant by Cooper *v.* Reynolds, 10 Wall. 308. It must be observed that the court in that case is speaking only of the means used to obtain jurisdiction; in which respect the proceeding by attachment is in the nature of the true proceeding in rem. See also Pennoyer *v.* Neff, 95 U. S. 714; Easterly *v.* Goodwin, 35 Conn. 273.

object of the litigation is simply to declare a judgment against the person of the defendant, and not to determine any question in regard to the liability of the property to forfeiture, such as would arise in a proper proceeding in rem. Sir John Jervis, in pronouncing judgment in The Bold Buccleugh,[1] thus distinguished the case of attachment: 'The foreign attachment is founded upon a plaint against the principal debtor, and must be returned nihil before any step can be taken against the garnishee; the proceeding in rem, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case the proceedings are in personam; in the latter they are in rem. The attachment, like a common-law distringas, is merely for the purpose of compelling an appearance.'

It may, however, be said that an order of sale of perishable goods levied on by attachment operates as a proceeding in rem, since the sale gives a title against all persons;[2] the order is given upon a determination of the perishable nature of the property, and the case obviously requires the most ample protection to purchasers. But apart from such cases, the authorities agree that attachment in causes in personam has no effect upon the property taken except between the parties to the proceeding.[3] It is called a proceeding in rem simply because property is seized at the outset instead of in execution of judgment for a plaintiff. The attachment cannot rise higher than the ultimate judgment.

[1] 7 Moore, P. C. 267, 282. See to the same effect Megee *v.* Beirne, 39 Penn. St. 50.

[2] Megee *v.* Beirne, 39 Penn. St. 50.

[3] See cases just cited. In the note of Hare and Wallace to the Duchess of Kingston's Case, 2 Smith, Lead. Cas. p. 890, 5th Am. ed., it is said: 'Properly speaking, however, proceedings by attachment are not proceedings in rem, but against the interest of the defendant and those claiming under him in the thing attached. Thus, a judgment rendered on the attachment of a debt or fund, or of specific assets of any other description, will not be a bar to any other demand than that of the person against whom the attachment was issued and of those claiming under him, even if it consist in an adverse claim to the property attached, or grow out of its negotiation when it is a negotiable security. Barber *v.* Hartford Bank, 9 Conn. 407; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564; Keiffer *v.* Ehler, 18 Penn. St. 388.' And these remarks are also applicable to proceedings in replevin. Ibid.; Certain Logs of Mahogany, 2 Sum. 589; Dow *v.* Sanborn, 3 Allen, 181; Megee *v.* Beirne, supra.

§ 2. *Requisites of the Estoppel.*

1. In order to an estoppel by res judicata there must have been a judgment; verdicts or other findings not followed by judgment are not binding.[1] A fortiori is lis pendens no bar to another suit, though it may be ground for a plea in abatement.[2]

2. In the next place the judgment must have been valid.[3] If for want of jurisdiction,[4] or for any other reason, it was void, it will have no effect; though it is otherwise, as we shall see, if it was only voidable. In Wixom *v.* Stephens, just cited, the former judgment (for the plaintiffs) was ineffectual by reason of a mistake in the name of one of the plaintiffs; and the court was of opinion that they were not precluded from bringing a new suit to recover upon the original demand. Chief Justice Cooley said that if for any reason the judgment was not valid, and the plaintiffs could not enforce it, it could not constitute a bar to a new suit. The bar in such a case sprang from the fact that the party had already obtained a higher security; where he had obtained no new security, his remedy upon the original demand was not taken away.

To give a court, for purposes of res judicata, jurisdiction of a cause in personam, according to the explanation already given of that term,[5] it is necessary that both the person of the defendant and the subject-matter of the suit should be fully within the cognizance of the court, either at the beginning or in the course of the action. If, however, the defendant is a citizen or resident of the state of the forum, he will be bound by the laws of that state concerning the mode of acquiring jurisdiction over

[1] Estate of Holbert, 57 Cal. 257; Hawkes *v.* Truesdell, 99 Mass. 557; Burlen *v.* Shannon, ib. 200; Lea *v.* Lea, ib. 493; Thurston *v.* Thurston, ib. 39; Herbert *v.* Fera, ib. 198; Wadsworth *v.* Connell, 104 Ill. 369, 374. There appears to be some doubt in regard to this point in England. Everest & Strode, 26; Brown, Estoppel, pl. 189; Coke, Litt. 227 b.

[2] Colt *v.* Partridge, 7 Met. 570, 574; Moore *v.* Spiegel, 142 Mass. 413, suit pending in another state.

[3] Wixom *v.* Stephens, 17 Mich. 518.

[4] See e. g. Queen *v.* Hutchins, 6 Q. B. D. 300; s. c. 5 Q. B. D. 353; Smith *v.* Neal, 109 U. S. 426; Meltzer *v.* Doll, 91 N. Y. 365, 373 (ex parte proof in bankruptcy); Dodd *v.* Una, 40 N. J Eq. 672, 713, that neither acquiescence nor request is sufficient to give a court jurisdiction of the subject-matter of a cause. To the same effect, School Trustees *v.* Stocker, 13 Vroom, 116.

[5] Ante, pp. 42, 43.

him;[1] if not, jurisdiction can be obtained over him, so as to make the judgment available for any purpose other than the appropriation of property of his actually levied upon, only by personal service of process upon him within the state of the forum,[2] lawfully made, or by his voluntary and general appearance (without fraud practised upon him,[3] it seems). Appearance for the mere purpose of contesting the court's jurisdiction will not be sufficient to enable the court to proceed as upon full jurisdiction and pronounce a judgment that will be res judicata.[4] If, however, the cause be a true property proceeding in rem as explained heretofore, the presence of a party, assuming that proper monition or notice has been given, becomes immaterial. The presence of the subject-matter will be enough to give complete jurisdiction.

But where, the court having proper jurisdiction, judgment is merely voidable, that is, where the court had jurisdiction to pronounce it and the judgment is simply erroneous, or the verdict wrongly found, it will be as conclusive in collateral actions as if it had been in all respects rightly determined. A voidable judgment is perfectly valid until set aside or reversed; a judgment is, for the purposes of the decision, as conclusive upon the law involved in the cause as upon the facts,[5] otherwise the doctrine of res judicata would in many cases be a mere delusion.

3. Further, a judgment, in order to work an estoppel against another litigation upon the same cause of action, must have been rendered upon the merits of the cause. If the decision was ren-

[1] Hood *v.* Hood, 11 Allen, 196; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Rousillon *v.* Rousillon, 14 Ch. D. 351; ante, p. 49. But probably no sovereignty would attempt to make a judgment binding upon its citizens beyond the disposition of property attached, without service of process or general appearance, unless the judgment was a true judgment in rem, as e. g. a decree of divorce. Hood *v.* Hood, 110 Mass. 463.

[2] Galpin *v.* Page, 18 Wall. 350; Cooper *v.* Reynolds, 10 Wall. 308; Durant *v.* Abendroth, 97 N. Y. 132; post, Foreign Judgments in Personam.

[3] Dunlap *v.* Cody, 31 Iowa, 260; Pfiffner *v.* Krapfel, 28 Iowa, 27. See Wanzer *v.* Bright, 52 Ill. 35. Perhaps it would be necessary in such a case to deny the justice of the claim as well as to allege the fraud. Luckenback *v.* Anderson, 47 Penn. St. 123; White *v.* Crow, 110 U. S. 183.

[4] Walling *v.* Beers, 120 Mass. 548; post, Foreign Judgments in Personam.

[5] Lawrence *v.* Milwaukee, 45 Wis. 306; Case *v.* Beauregard, 101 U. S. 688.

dered upon a mere motion or a summary application,[1] or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement, e. g. because the wrong forum or mode of suit had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder, non-joinder, non-appearance of the plaintiff,[2] or the like, the parties are at liberty to raise the main issue again in any other form they choose.[3] Thus, in Kendal *v.* Talbot[4] the defendants to an action of covenant pleaded in bar a former judgment, rendered in the same court in their favor, in an action brought against them by the plaintiff upon the same covenant. Upon oyer it appeared that the judgment pleaded was rendered on the ground of the insufficiency of the plaintiff's declaration. The court held that such a judgment could not be a bar.[5] And the same is true of the dismissal of a bill in chancery for insufficiency;[6] and so of a 'discontinuance,' though by agreement of parties.[7] Judgment proceeds upon the merits when the very cause of action is decided upon.[8] Such a decision concludes the parties and their privies from relitigating the claim.

However, judgment upon a point not touching the merits of the principal matter in dispute will, it seems, in respect of that point, ordinarily[9] raise an estoppel. The parties and their privies will

[1] Simson *v.* Hart, 14 Johns. 63, 76; Kanne *v.* Minneapolis Ry. Co., 33 Minn. 419; Bennett *v.* Denny, ib. 530, 533; s. c. affirmed nom. Denny *v.* Bennett, 128 U. S. 489.

[2] Chesnutt *v.* Frazier, 6 Baxter, 217.

[3] Hanchey *v.* Coskrey, 81 Ala. 149; Strang *v.* Moog, 72 Ala. 460; McCall *v.* Jones, ib. 368; Wood *v.* Fant, 55 Mich. 185; Clark *v.* Young, 1 Cranch, 181; Kendal *v.* Talbot, 1 A. K. Marsh. 321; Birch *v.* Funk, 2 Met. (Ky.) 544; Stevens *v.* Dunbar, 1 Blackf. 56; Campbell *v.* Hunt, 104 Ind. 210, 215; Proctor *v.* Cole, ib. 373; Dillinger *v.* Kelley, 84 Mo. 561, 569; Griffin *v.* Seymour, 15 Iowa, 30; Phelps *v.* Harris, 101 U. S. 370; Schertz *v.* People, 105 Ill. 27; Brackett *v.* People, 115 Ill. 29; Andrews *v.* School District, 35 Minn. 70.

[4] 1 A. K. Marsh. 321.

[5] See also Thomas *v.* Hite, 5 B. Mon. 590; Birch *v.* Funk, 2 Met. (Ky.) 544; Stevens *v.* Dunbar, 1 Blackf. 56.

[6] Thomas *v.* Hite, 5 B. Mon. 590.

[7] Kronprinz *v.* Kronprinz, 12 App. Cas. 256, affirming 11 P. D. 40, C. A. But the effect would turn upon the nature of the agreement. If there was a release of all claims, there could be no new suit. Ib.

[8] Judgment sustaining a plea of the Statute of Limitations is not upon the merits. McElmoyle *v.* Cohen, 13 Peters, 312; Morrell *v.* Morgan, 65 Cal. 575. But in a subsequent suit in the domestic courts, between the same parties or those claiming under them, after judgment therein for the plaintiff, the Statute of Limitations could not be alleged against the cause of action. See Shields *v.* Schiff, 124 U. S. 351, 357, prescription.

[9] But see cases supra as to the decision of a mere motion or summary application.

be precluded from asserting the contrary of the fact found in such judgment.[1] Thus, dismissal of a suit 'for want of jurisdiction' will estop the plaintiff from alleging, after the expiration of the Statute of Limitations, that he had begun suit (no other one having been undertaken) within the proper time.[2] And, indeed, it appears to be true as a general proposition that where a party succeeds in defeating an action by his pleading, by motion, or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first.[3]

The question of the effect of a judgment of non-pros of part of a cause of action arose in Howes *v.* Austin,[4] in a subsequent suit upon the matter non-prossed. The plaintiff in the former action had been called and defaulted for want of a replication to the defendant's plea to the first and second count of the declaration. The plaintiff had failed to reply within the time required by a rule of court; and a judgment was entered for the defendant in regard to those counts, that he go hence without day. The defendant contended that this judgment barred any subsequent action upon the demand stated in those counts. But the court decided that though it might be final for costs,[5] its effect in the present case was simply to turn the plaintiff out of court on the cause of action non-prossed; leaving him at liberty to proceed for the recovery precisely as though the counts non-prossed had never been filed.[6]

In like manner the Supreme Court of the United States in Homer *v.* Brown[7] said that a judgment of nonsuit was given only after the appearance of the defendant when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he had not followed the remedy which he had chosen, as he ought to do. For such delinquency or mistake he might be non-prossed, and was liable to pay the

[1] See Adams *v.* Graves, 75 Iowa, 642.

[2] Gray *v.* Hodge, 50 Ga. 262. The subject is of special importance in relation to judgments of courts of a sister state. The reader is referred to the chapter on Foreign Judgments in Personam.

[3] Lehman *v.* Clark, 85 Ala. 109, 113; Jones *v.* McPhillips, 82 Ala. 102, 116; Hill *v.* Huckabee, 70 Ala. 183; Hooker *v.* Hubbard, 102 Mass. 239; Clay *v.* Buchanan, 69 Iowa, 88. See post, chapter 26, at end.

[4] 35 Ill. 396.

[5] 2 Archbold, Practice, 229.

[6] See also 3 Black. Com. 296.

[7] 16 How. 354.

costs. But as nothing positive could be implied from the plaintiff's error in regard to the subject-matter of his suit, he might reassert it by the same remedy in another suit, if appropriate to his cause of action, or by any other which is so, if the first was not.[1]

It is not, however, for a non-appearance only, or for delays or defaults, that a nonsuit may be entered. The plaintiff's proceeding in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may agree to take it from the jury with a view to submit the law of the case to the court upon an agreed statement of facts, under an agreement that the plaintiff shall be non-prossed if the facts stated are insufficient to maintain the right which he claims. The court in such a case will order a nonsuit if it think the law of it against the plaintiff; but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same as if he had been non-prossed for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent.[2]

Indeed, nonsuit is declared to be no judgment at all; it is only a withdrawal of the case before verdict, where a verdict is the essential thing.[3] Hence a nonsuit taken by the plaintiff, at whatever stage of the case, cannot estop him to bring a new action, even though the case had gone to judgment, if on appeal

[1] Ensign *v.* Bartholomew, 1 Met. 274. 'The case where a party is not barred, by a judgment of nonsuit, from having a new action, is where he has either mistaken his remedy and brought an action which he could not maintain, or where he has two collateral, independent remedies, in which an assertion of one is not repugnant to the existence of the other.' The court in Butler *v.* Hildreth, 5 Met. 49, 52, quoted in Warren *v.* Spencer Water Co., 143 Mass. 9, 15.

[2] Homer *v.* Brown, 16 How. 354. 'Judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter.' Per Clifford, J. in Derby *v.* Jacques, 1 Cliff. 425, 432; citing Homer *v.* Brown, supra; Morgan *v.* Bliss, 2 Mass. 111; Knox *v.* Waldoborough, 5 Greenl. 185; Bridge *v.* Sumner, 1 Pick. 371; Wade *v.* Howard, 8 Pick. 353. See also Coit *v.* Beard, 33 Barb. 357; Dexter *v.* Clark, 35 Barb. 271; Jones *v.* Underwood, ib. 211; Jay *v.* Carthage, 48 Maine, 353.

[3] In re May, 28 Ch. D. 516, Brett, M. R.; Manhattan Ins. Co. *v.* Broughton, 109 U. S. 121; Bucher *v.* Cheshire R. Co., 125 U. S. 555. See Everest & Strode, Estoppel, 29, 30.

or other proceeding the judgment had been reversed and the cause remanded before he dismissed his suit.[1] If, however, the parties to a cause agree to await the result of another trial, it is said they will be estopped by the judgment in that case even though it was one of nonsuit.[2] And judgment by 'retraxit' is held binding collaterally, being distinguished from nonsuit.[3]

A decision upon a demurrer which has, however, clearly gone to the merits of the case, by being based distinctly upon a specific allegation of the facts touching the substance of the action or the defence, is an effectual bar to further litigation;[4]

[1] Bucher *v.* Cheshire R. Co., supra; Holland *v.* Hatch, 15 Ohio St. 464. See Loeb *v.* Willis, 100 N. Y. 231; post, p. 60.

[2] Brown *v.* Sprague, 5 Denio, 545. Among the many other illustrations of the doctrine that a judgment is no bar to a new suit upon the same demand unless there was a trial on the merits, the following may be mentioned: Where the record of a suit showed that by the plaintiff's failing to appear to his action his writ was 'abated and dismissed,' and judgment given for the defendant for $5 and costs, this was held no bar to a new suit. Haws *v.* Tiernan, 53 Penn. St. 192. So where judgment has been rendered solely for informality in a replevin bond, a new action may be brought. Walbridge *v.* Shaw, 7 Cush. 560; Morton *v.* Sweetser, 12 Allen, 134. So of a cause tried upon the merits, but eventually dismissed for want of jurisdiction. Waddle *v.* Ishe, 12 Ala. 308. In McFarlane *v.* Cushman, 21 Wis. 401, the fact that the plaintiff, obligee in a bond sued on, had previously brought suit upon the same bond before its maturity, was decided to be no bar to the present action, instituted after the bond had become due. To the same effect, Dillinger *v.* Kelley, 84 Mo. 561, 569; Gray *v.* Dougherty, 25 Cal. 266; Quackenbush *v.* Ehle, 5 Barb. 469. The assignee of a mortgage having sued to foreclose the same, judgment was given against him for a defect in the assignment; and it was decided that this was no bar to a subsequent suit brought after the assignment had been perfected. Mitchell *v.* Cook, 29 Barb. 243. So a decree fixing the fact that the plaintiff had no title at the time of a former suit is no bar to a suit after having acquired the proper title. University *v.* Maultsby, 2 Jones Eq. 241; Woodbridge *v.* Banning, 14 Ohio St. 328; Taylor *v.* McCrackin, 2 Blackf. 261; Perkins *v.* Parker, 10 Allen, 22.

[3] Judgment on retraxit, being an admission of record by the plaintiff that he has no cause of action, is held to be as perfect a bar as a judgment after verdict. United States *v.* Parker, 120 U. S. 89, 95; 3 Black. 296; Bank of Commonwealth *v.* Hopkins, 2 Dana, 395; Merritt *v.* Campbell, 47 Cal. 542; Wohlford *v.* Compton, 79 Va. 333; Coffman *v.* Brown, 7 Smedes & M. 125. In the last case the court held that the following plea did not constitute a retraxit: 'That a suit had been previously brought for the same cause of action, between the same parties, in which the plaintiff in his own proper person came into court and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdrew himself; whereupon it was considered by the court that the plaintiff should take nothing, and that defendant go without day.'

[4] Bissell *v.* Spring Valley, 124 U. S. 225; Bonchaud *v.* Dias, 3 Denio, 238; McLaughlin *v.* Doane, 40 Kans. 392;

and upon the facts admitted it is held to be as conclusive as a verdict;[1] and this will be true in regard to such facts, though the second litigation, being between the same parties, is not upon the same cause of action.[2] But where a demurrer presents two objections, and is sustained generally, one of the grounds being a preliminary defect and the other going to the merits of the case, it is held that it will be presumed that the decision rested upon the former ground.[3] Where judgment had been given in a small sum for failure to perform a contract[4] declared upon in several counts, some for negligence, some for false warranty, and one in trover, it was strenuously argued in a subsequent suit on the contract that by judgment for the plaintiff, though upon a demurrer to the declaration, it had been conclusively determined that the contract had been performed, except so far as the judgment for the small sum indicated the contrary. But the court ruled otherwise.[5]

Carlin *v.* Brackett, 38 Minn. 307; Johnson *v.* Pate, 90 N. Car. 334; Los Angeles *v.* Mellus, 58 Cal. 16; Felt *v.* Turnure, 48 Iowa, 397; Gray *v.* Gray, 34 Ga. 499; Wilson *v.* Ray, 24 Ind. 156; Estep *v.* Larsh, 21 Ind. 190; Campbell *v.* Hunt, 104 Ind. 210, 215; Robinson *v.* Howard, 5 Cal. 428; Terry *v.* Hammonds, 47 Cal. 32; City Bank of New Orleans *v.* Welden, 1 La. An. 46; Keater *v.* Hock, 16 Iowa, 23; Coffin *v.* Knott, 2 G. Greene, 582; Perkins *v.* Moore, 16 Ala. 17. A plaintiff in a bill in equity is not concluded on demurrer by his allegations of *law*. Thompson *v.* National Bank of Redemption, 106 Mass. 128; Brown *v.* Newall, 2 Mylne & C. 555, 576.

[1] Bissell *v.* Spring Valley, 124 U. S. 225; Bouchaud *v.* Dias, 3 Denio, 238; Nispel *v.* Laparle, 74 Ill. 306. Judgment sustaining a demurrer to a declaration in a suit for seduction, based upon the Statute of Limitations, is no bar to a subsequent suit by the same plaintiff against the same defendant, averring her infancy, if that fact was not set up in the former action. Morrell *v.* Morgan, 65 Cal. 575.

[2] Bissell *v.* Spring Valley, supra.

[3] Bissell *v.* Spring Valley, supra; Griffin *v.* Seymour, 15 Iowa, 30.

[4] Chapin *v.* Curtis, 23 Conn. 388.

[5] 'Did that demurrer prove,' said Mr. Justice Ellsworth, 'that the facts contained in the declaration were not true? and it must be this to help the plaintiff. It rather proved the contrary if it proved anything; and for the purposes of that case it certainly did prove the contrary. How then did it prove full performance by the plaintiff, which was flatly denied in the declaration? The whole effect of the judgment on a demurrer, and the $100 damages, is that on that declaration, on some of the counts, the defendant had subjected himself to pay $100 for not performing his contract, or for his fraudulent warranty, or his conversion of the plaintiff's goods. The admission by the demurrer is rather that the common carriers did nothing than that they performed anything, much less that they had done everything except to the amount of $100, which damages might have been given, and probably were given, for the carriers' destroy-

Dismissal of a bill in equity, upon the merits, is of course a bar to further proceedings in the same court for the same purpose, and this, too, though the court may not have gone into the evidence,[1] as in the case of a dismissal by agreement.[2] In the case of Borrowscale *v.* Tuttle[3] the plaintiff sought to redeem a parcel of land from mortgage. The defence was this: The plaintiff's grantor of the equity of redemption had brought a suit in chancery against the same defendant, who appeared and answered under oath. Subsequently on motion of the plaintiff in that cause, and without the defendant's knowledge, the bill was dismissed and judgment given for the defendant for costs. The time had expired within which the plaintiff might have filed a replication and taken testimony. The court held the defence perfect. It was a judgment which, as had been settled in Foote *v.* Gibbs,[4] was conclusively presumed to have been upon the merits, and was a final determination of the controversy.[5]

Ordinarily a decree in equity is in fact (though not as matter of law) rendered upon the merits when no qualifying words, such as 'without prejudice,' are used.[6] Still, where an answer

ing a portion of the shippers' lumber in the port of New York; and so that record furnished no evidence at all of the performance of the voyage, . . . any more than a record of a recovery by a proprietor, who has sued his contractor for stealing and wasting the timber he furnished him to build the proprietor's house, and a recovery for the value of the lumber destroyed, proves that the house was built in time and manner as agreed; and there being other counts for not performing in due time and in proper manner makes no difference, for an admission even of the whole cause of action in such count has no tendency to prove performance by the builder.' See also concerning judgment on demurrer Murdock *v.* Gaskill, 8 Baxter, 22; Jameson *v.* McCoy, 5 Heisk. 109; McNairy *v.* Nashville, 2 Baxter, 251; Gould *v.* Evansville R. Co., 91 U. S. 546.

[1] Lyon *v.* Perin Manuf. Co., 125 U. S. 698.

[2] Kronprinz *v.* Kronprinz, 12 App. Cas. 256, 259; The Bellcairn, 10 P. D. 161, C. A.

[3] 5 Allen, 377.

[4] 1 Gray, 412.

[5] Further see Case *v.* Beauregard, 101 U. S. 688; Phelps *v.* Harris, ib. 370.

[6] Lyon *v.* Perin Manuf. Co., supra; Durant *v.* Essex Co., 7 Wall. 107; Walden *v.* Bodley, 14 Peters, 156; Hughes *v.* United States, 4 Wall. 237; Bigelow *v.* Winsor, 1 Gray, 301; Foote *v.* Gibbs, ib. 412; Tankersley *v.* Pettis, 71 Ala. 179, 185; Strang *v.* Moog, 72 Ala. 460, 465; Knowlton *v.* Hanbury, 117 Ill. 471; Adams *v.* Graves, 75 Iowa, 642, 646. See Langmead *v.* Maple, 18 C. B. N. S. 255; Mey *v.* Gullman, 105 Ill. 272; Garrick *v.* Chamberlain, 97 Ill. 620; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180; Smith *v.* Auld, 31 Kans. 262, 267. In the last case it is declared, upon the

in equity sets up various matters in defence, some going to the merits of the case and others not, and there is a general decree of dismissal, the decree will not bar another action for the same demand because of the uncertainty whether it was rendered on the merits,[1] unless the uncertainty were entirely removed by evidence.[2] Dismissal of a bill seeking relief in equity in respect of an instrument on which a party can sue at law is no bar, however, to an action at law upon the same instrument, though the decree does not state the dismissal to have been without prejudice. The dismissal merely means that there is no equity in the plaintiff's case, and a suit at law upon the instrument is not inconsistent with this.[3]

4. The judgment, further, should have been final.[4] We have seen that a preliminary decree or judgment, or a decision upon a motion[5] in the course of a trial, cannot ordinarily result, if the case go no further, in precluding the parties from drawing the matter into issue again. The case must have gone to a complete termination, so that nothing more is necessary, for the purpose of the suit, to settle the rights of the parties or the extent of those rights. Thus, an order in garnishment directing the garnishee to deliver certain property of the defendant to the sheriff for sale, from the proceeds of which the garnishee is to be paid a sum named in the order, is not an adjudication that the defendant owes the garnishee the amount fixed by the order,

authority of Loudenback *v.* Collins, 4 Ohio St. 251, and Love *v.* Trueman, 14 Ohio St. 45, that it should affirmatively appear that the dismissal was on the merits to make it a bar. And in the absence of evidence upon the point, that appears to be correct, for an estoppel can only be founded upon a certainty. Besides it should appear in some way that the fact in question was necessarily decided. See The Busteed, 100 Mass. 409. The fact that the dismissal is not stated to be without prejudice does not necessarily show that it was on the merits.

[1] Foster *v.* Busteed, 100 Mass. 409; Burlen *v.* Shannon, 99 Mass. 200; Cook *v.* Burnley, 45 Tex. 97, 117. See Mobile *v.* Kimball, 102 U. S. 691; Russell *v.* Place, 94 U. S. 606.

[2] Russell *v.* Place, 94 U. S. 606; Chrisman *v.* Harman, 29 Gratt. 494.

[3] Pendleton *v.* Dalton, 92 N. Car. 135; Cramer *v.* Moore, 36 Ohio St. 347; Porter *v.* Wagner, ib. 471; Beere *v.* Fleming, 13 Ir. C. L. 506. See also Wright *v.* Deklyne, 1 Peters C. C. 199; McNamara *v.* Arthur, 2 Ball & B. 349.

[4] Webb *v.* Buckalew, 82 N. Y. 555; Linington *v.* Strong, 111 Ill. 152, that judgment reversing and remanding a cause is not final, in the sense of the rule.

[5] Ford *v.* Doyle, 44 Cal. 635.

unless there was an issue concerning the sum due.[1] Nor will an estoppel arise upon the mere verdict of a jury or upon the finding of a judge or a referee unless the same is followed by a valid judgment.[2] But it is laid down that judgment cannot be prevented by an attempt on the part of the plaintiff to dismiss a cause after judgment against him, appeal and affirmance, and remanding of the action for further proceedings.[3] A conditional judgment is binding for its own purpose equally with an ordinary judgment.[4]

5. In the next place the judgment should be in force at the time of the alleged res judicata. If the question is still sub judice, and the judgment in question suspended meantime, there is no estoppel;[5] while if, notwithstanding any subsequent proceedings, it remains in full force and vigor, as in the case of a writ of error,[6] there is a case of res judicata. On the other hand, if suit has been discontinued even after judgment, the effect is to remove the estoppel.[7] In the case cited a mortgagee, after

[1] Collins *v.* Jennings, 42 Iowa, 447. See also Burnes *v.* St. Louis Ry. Co., 71 Mo. 163. The rule as to interlocutory orders has been somewhat enlarged by statute in New York; but still they are not deemed to possess the full efficacy of judgments. Webb *v.* Buckalew, 82 N. Y. 555; Easton *v.* Pickersgill, 75 N. Y. 599; Riggs *v.* Pursell, 74 N. Y. 370; Dwight *v.* St. John, 25 N. Y. 203. Before the Code they had no force as res judicata. Riggs *v.* Pursell, supra; Webb *v.* Buckalew, supra. In any event the interlocutory decree must have been final, so as to be the subject of a present appeal. Webb *v.* Buckalew. Concerning ex parte orders see Burnes *v.* St. Louis Ry. Co., 71 Mo. 163; Collins *v.* Jennings, 42 Iowa, 447. And see Megee *v.* Beirne, 39 Penn. St. 50; ante, p. 50.

[2] Webb *v.* Buckalew, supra; Carlisle *v.* McCall, 1 Hilt. 399; Audubon *v.* Excelsior Ins. Co. 27 N. Y. 216; Leonard *v.* Baker, 5 Denio, 220; McLaughlin *v.* McGee, 79 Penn. St. 217.

[3] Croft *v.* Johnson, 8 Baxter, 390.

[4] Fuller *v.* Eastman, 81 Maine, 284; Merriam *v.* Merriam, 6 Cush. 91, 93; Burke *v.* Miller, 4 Gray, 114; Sparhawk *v.* Wills, 5 Gray, 423; Stevens *v.* Miner, ib. 429, note; Minot *v.* Sawyer, 8 Allen, 78; Freison *v.* Bates College, 128 Mass. 466; Divoll *v.* Atwood, 41 N. H. 449. Beyond its own purposes, including therein what is necessary to establish them, conditional judgment is not binding, of course. Fuller *v.* Eastman, supra; Ladd *v.* Putnam, 79 Maine, 568; Vinton *v.* King, 4 Allen, 562; Minot *v.* Sawyer, supra; Davis *v.* Bean, 114 Mass. 361. The only question, then, is of the proper purpose of the judgment.

[5] A fortiori if it has been reversed or set aside. Smith *v.* Fairfield, 77 N. Y. 414; Wood *v.* Jackson, 8 Wend. 9; Delanney *v.* Burnett, 4 Gill, 453. The effect of carrying a cause to a higher court is a matter largely of local law.

[6] Hughes *v.* Dundee Mortgage Co., 28 Fed. Rep. 40.

[7] Loeb *v.* Willis, 100 N. Y. 231. See Holland *v.* Hatch, 15 Ohio St., 464; ante, p. 56.

judgment of foreclosure against both the mortgagor and one who had assumed the mortgage and was found liable accordingly, obtained leave, before sale, to discontinue and bring suit upon the mortgage bond; which suit was brought accordingly. It was now held that the judgment of foreclosure did not, under the circumstances, conclude the defendant who had assumed the mortgage to set up a failure of consideration for his agreement to assume that security.[1]

6. Finally, it is of the essence of this (as indeed it is of every other) kind of estoppel that the subject of it should be certain. The suggestion above made concerning dismissal of bills in equity may be enlarged, and the rule broadly laid down as applicable to all cases of judgments, decrees, and sentences, that when it is doubtful (either from the record or from evidence designed to explain the same) upon which of several issues the judgment, decree, or sentence proceeded, the subject is still at large for further litigation.[2] There is no presumption available to make the record binding in such a case.

Another requisite remains, which should be considered in a separate section.

§ 3. *Special Tribunals.*[3]

In order that a judgment may be relied on as res judicata it must have been one of a legally constituted court. It is of the very root of the idea of the right of the state to settle the disputes of individuals that the machinery employed for the purpose should itself be constituted according to law. The point is illustrated by Rogers *v.* Wood.[4] That case was a declaration in prohibition; and the question in issue was whether an alleged

[1] 'By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it had never been. If a suit be discontinued at any stage, or the judgment rendered therein be set aside, or vacated, or reversed, then the adjudication therein concludes no one, and it is not an estoppel or bar in any sense.' Earl, J. in Loeb *v.* Willis.

[2] Russell *v.* Place, 94 U. S. 606; Burlen *v.* Shannon, 99 Mass. 200, 204; McDowell *v.* Langdon, 3 Gray, 513; Perkins *v.* Parker, 10 Allen, 82; Sawyer *v.* Woodbury, 7 Gray, 499; Lall *v.* Pershad, L. R. 9 Ind. App. 64.

[3] In regard to such tribunals in England see Everest & Strode, 43–50, 91 et seq.

[4] 2 Barn. & Ad. 245.

usurpation of the office of mayor of Chester by the plaintiff had been committed within or without the jurisdiction of the Court of Session of the county of Chester. For the defendants a document was produced from the remembrancer's office of the Court of Exchequer, purporting to be a decree made (after the hearing of a complaint against the citizens of Chester, and their answer) by the lord high treasurer of England, the chancellor of the Exchequer, the under treasurer, and the chief baron, with the advice and assent of a sergeant of the queen, and the queen's attorney and solicitor-general, and others of the same court. The document, which recited a decree that the city of Chester was part and parcel of the county of Chester, was produced to show that the usurpation had been committed within the jurisdiction of the court and county above named.

The court was of opinion that it was improperly received. Lord Tenterden said that no one could read the names that appeared in it without seeing that the decree was neither that of the Court of Exchequer, nor of any court of justice known at that time. The judges consisted of some persons who were members of the Court of Exchequer, joined with others who were not. He said it was therefore evident that it was a proceeding before persons not forming any court known to the laws of the land as having authority to decide the matter in issue or to make the decree in question. And he said that the document was not even evidence of reputation.

In a case in Pennsylvania[1] the defendant, to sustain a plea of res judicata, gave in evidence the record of proceedings before a justice of the peace by the same plaintiff against the defendant upon the same cause of action; in which case judgment had been given for the defendant. It appeared from the record that the summons to appear before the justice was returnable December 14. The constable returned that the plaintiff did not want the summons served. Afterwards and before the return day the defendant required notice to be given to the plaintiff to try the cause; the notice was served and judgment by default given for the defendant. The court held the proceedings no bar. The ground was that there was a substantial discontinuance of

[1] Fisher v. Longnecker, 8 Barr, 410.

the first suit, and that the subsequent proceedings were therefore coram non judice. Without a due return of service upon the defendant the justice of the peace had no hold upon him; and after the discontinuance neither party could carry on the action without the assent of the other except by a new writ. The court further said that under the statute the judgment of the justice was only a nonsuit; this also showed that it was no bar.

A court consisting of several judges does not cease to be a legal court for the purpose of a cause by reason of the fact that the judges are equally divided in opinion. In a case before the Supreme Court of Massachusetts,[1] the defendant having pleaded in bar a decree rendered in the Supreme Court of the United States, the plaintiff contended that the decree was not a bar to his action by reason of the fact that it was rendered by a divided court. Mr. Justice Chapman, speaking for the court, after referring to the fact that it was the early practice of the English courts that no judgment should be given when the court were equally divided,[2] said that it was not so in Massachusetts. And the practice was otherwise also in New York and in the United States courts.[3] The record had all the elements of a final decree; it purported to order, adjudge, and decree that the decree of the Circuit Court should be affirmed. Its substance would not have been different if the judges had unanimously decided the case. The statement that it was rendered by a divided court did not mean that they were divided upon the question whether it should be rendered; it merely meant that they were divided upon the questions of law involved in it.

The same is true of a special court made up by agreement of parties, to take the place of judges disqualified.[4] The regular judgments too of a de facto court whose existence has afterwards been pronounced unconstitutional and void are held valid.[5]

[1] Durant *v.* Essex Co., 8 Allen, 103; s. c. 7 Wall. 107.

[2] Proctor's Case, 12 Coke, 118.

[3] Bridge *v.* Johnson, 5 Wend. 342; Morse *v.* Goold, 11 N. Y. 281; Jessup *v.* Carnegie, 80 N. Y. 441; Etting *v.* Bank of United States, 11 Wheat. 59.

[4] Donnell *v.* Hamilton, 77 Ala. 610.

[5] Masterson *v.* Matthews, 60 Ala. 260; Mays *v.* Stoneum, 2 Ala. 390; State *v.* Porter, 1 Ala. 688. See State *v.* Carroll, 38 Conn. 449; Den *v.* Reddick, 4 Ired. 368; State *v.* Alling, 12 Ohio, 16; Case *v.* State, 5 Ired. 1; State *v.* Anone, 2 Nott & M. 27.

Judgments rendered in the courts of the Southern states during the rebellion are valid;[1] they were the judgments of courts of a de facto government, at all events.[2]

Though it is commonly said that only the judgments of the public courts of justice are to be held conclusive, there are cases in which the proceedings of other bodies are on special grounds regarded with the same consideration. Of this nature, so far as questions of liberty and property are concerned, must be acts done in the proper enforcement of reasonable regulations of institutions of learning, charity, or discipline. The decisions of the managing boards, lawfully constituted, upon individual delinquencies touching the institutions alone must be conclusive; conclusive, that is to say, upon the matter of delinquency, and hence no court of justice can have a right to interfere with the imposition of reasonable pains or penalties in consequence. A case of the kind[3] occurred before Lord Mansfield in the year 1775. The defendant was indicted for an assault upon the prosecutor, in turning him out of the grounds of one of the colleges at Cambridge. The defence in substance was that the prosecutor had been expelled under an order of rustication signed by the master and one fellow, followed by a sentence by the master and two fellows; which sentence had been confirmed by the master and ten fellows. This sentence of expulsion the prosecutor endeavored to attack as illegal. But the court refused to allow this, for reasons stated in the note.[4]

This doctrine concerning the rulings of institutions having

[1] Horn *v.* Lockhart, 17 Wall. 570; Hill *v.* Huckabee, 52 Ala. 155; McQueen *v.* McQueen, 55 Ala. 433.

[2] Comp. note 4, p. 65.

[3] Rex *v.* Grundon, 1 Cowp. 315.

[4] Lord Mansfield, after having shown that the prosecutor was only a commoner and not a member of the college, said that he was then but a mere boarder, and had no right to continue in the college after they had given him notice to quit. 'But,' said he, 'supposing Mr. Crawford [the prosecutor] were subject to the rules and orders of the college; in that case it is insisted that the sentence of expulsion is illegal. And at the trial the statutes of the college were offered in evidence to show that it should have been signed by the master and a *majority* of the fellows, whereas it was signed by the master and *one* fellow only. The answer to it is that, even if the allegation were well founded, the merits, the justice, or the regularity of the expulsion cannot be entered into at the assizes; but the proper mode of impeaching it is by appeal to the visitor. Mr. Justice Willes was of that opinion at the trial, but reserved the question whether the statutes were to be admit-

the temporary tuition or charge of men is doubtless confined to requirements and delinquencies over which the governing body has exclusive jurisdiction; a jurisdiction founded upon the fact that the institution and the individual are the only parties concerned. Where the rights of others are immediately concerned, the rulings of the governing body should have no such effect.[1] No decision of such a body can, for instance, bar the state from prosecuting a member of an institution who has violated the criminal law of the land; nor where such a matter is in issue can the decision of the body in any event be more than prima facie evidence for or against the party prosecuted. The decisions of church courts, councils, or synods in this country concerning the acts and the rights and duties of members are probably to be viewed in the same light.[2]

In this connection we may refer to the judgments of military courts. In the recent case of Hefferman *v.* Porter[3] the defendant pleaded in bar of the plaintiff's action the judgment of a tribunal known as the Civil Commission, created by order of the commander of the Federal forces at Memphis, Tennessee, in April, 1863. The plaintiff demurred to the plea; but the demurrer was overruled.[4] The same doctrine was applied to

ted in evidence to impeach the sentence and enter into the validity of it then. And we are all of opinion with Mr. Justice Willes that they could not. So that even if Mr. Crawford was a member, and subject to the jurisdiction, rules, and orders of the college, his mode of redress is by appeal to the visitor, and not to this court.'

[1] See Ginnett *v.* Whittingham, 16 Q. B. D. 761.

[2] See Chase *v.* Cheney, 58 Ill. 509, 537, 538, and cases cited.

[3] 6 Cold. 391.

[4] Mr. Justice Ellett, speaking for the court, said: 'The establishment of legal tribunals for the adjudication and protection of civil rights is the most favorable condition for the conquered people. There is always more or less security in a judicial body organized according to the forms of law for the administration of justice according to the rules that obtain in courts of judicature. There is a dignity and responsibility about such a position that does not fail to command a decent regard to the ordinary rules of justice and of right, or to mitigate the rigor of military rule to some degree of harmony with the humane theories of modern warfare. If, then, the power to create such civil courts exists by the laws of war, in a place held in firm possession by a belligerent military occupation, and if their judgments and decrees are held to be binding on all parties during the period of such occupation, as the acts of a de facto government, we are not able to see on what grounds we can refuse to them a like effect when pleaded as res judicata before the regular judicial tri-

criminal cases of a capital nature in United States *v.* Reiter.[1] The court said that in a country held by military power the authority of the occupying force was paramount, and necessarily operated to the exclusion of all other independent authority in it. The judgments of courts-martial and of naval courts are a fortiori conclusive determinations of matters necessarily involved. In such as in all the cases now under consideration it must, however, be shown by the party relying upon the decision that the court or governing body had jurisdiction of the subject and of the parties.[2]

The judgments of the ordinary domestic courts of inferior jurisdiction are equally conclusive with the judgments of the superior courts, provided it appear from the record that the court had acquired jurisdiction of the cause.[3] In the case first cited the plaintiff in trespass quare clausum fregit under a lease from the defendants offered in evidence certain proceedings instituted in a former suit by the present defendants, before justices of the peace, to recover possession of the premises, in which the justices had refused to award restitution. The evidence was held to have conclusively shown that the present defendants were not entitled to have restitution of possession, and that the plaintiff was rightfully in possession.

The decisions of bodies or individuals, not constituting courts of justice in the ordinary sense, may also, in virtue of statutes, be binding upon questions of property; as, in general, the decisions of a body to which have been given semi-judicial powers, with a mode of review prescribed by law.[4] The decisions of the comptroller of the currency with reference to certain questions of the national currency are collaterally so treated.[5] The deci-

bunals of the state since the return of peace.'

[1] 4 Am. Law Reg. N. S. 534.

[2] See Dynes *v.* Hoover, 20 How. 65; Wooley *v.* United States, 20 Law Rep. 631.

[3] Hallock *v.* Dominy, 69 N. Y. 238; Cumberland Coal Co. *v.* Jeffries, 27 Md. 526; Burke *v.* Elliott, 4 Ired. 355; Ward *v.* State, 40 Miss. 108; Shaver *v.* Shell, 24 Ark. 122; Flitters *v.* Allfrey, L. R. 10 C. P. 29.

[4] Logansport *v.* La Rose, 99 Ind. 117, 127; Grusenmeyer *v.* Logansport, 76 Ind. 549; Board of Commissioners *v.* Karp, 90 Ind. 236; Cicero *v.* Williamson, 91 Ind. 541; Rutherford *v.* Davis, 95 Ind. 245. See Strosser *v.* Fort Wayne, 100 Ind. 443, and cases in notes following.

[5] Casey *v.* Galli, 94 U. S. 673.

sions of the United States commissioner of patents for invention are also binding in collateral actions.[1] In Jackson *v.* Lawton, just cited, a case of patent of lands, Mr. Chancellor Kent said that unless letters-patent were absolutely void on their face, or their issuance was unauthorized or prohibited by statute, they could only be avoided in a regular course of pleading in which the fraud, irregularity, or mistake should be regularly put in issue. The principle had been frequently admitted that the fraud must appear on the face of the patent to make it void in a court of law, and that when the fraud or other defect arose from circumstances dehors the grant, the grant could only be avoided by suit in chancery founded on a proceeding by scire facias, or by bill or information. And this language was recently adopted by the Supreme Court of the United States in a case of a patent for invention.[2]

Patents issued in due form and manner from the United States land department at Washington are also conclusive in collateral actions until set aside.[3] In Cassidy *v.* Carr, just cited, the claimant of a Mexican land grant proceeded to have the same confirmed at Washington, but by the survey made by the authorities a portion of the land covered by the Mexican grant was excluded; and it was held that the claimant was bound.[4] Mr. Justice Field, of the Supreme Court of the United States, has recently said that the land department was established to supervise the proceedings of conveyances of the lands of the United States, and to see that the requirements of the acts of Congress have been fully complied with. It must therefore of necessity 'consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal,

[1] Jackson *v.* Lawton, 10 Johns. 23; Rubber Co. *v.* Goodyear, 9 Wall. 788, 796; Eureka Co. *v.* Bailey Co., 11 Wall. 488; Field *v.* Seabury, 19 How. 332; Hosmer *v.* Wallace, 51. Cal. 368.

[2] Rubber Co. *v.* Goodyear, ut supra.

[3] Steel *v.* Smelting Co., 106 U. S. 447; Smelting Co. *v.* Kemp, 104 U. S. 636; Jackson *v.* Lawton, 10 Johns. 23; Cassidy *v.* Carr, 48 Cal. 339; Gallagher *v.* Riley, 49 Cal. 473. See also Herbst *v.* Smith, 71 Ind. 44; Mull *v.* Orme, 67 Ind. 95.

[4] Judgment against an inchoate Mexican land grant is not a bar to proceedings after the grant has been perfected, for obvious reasons. Amesti *v.* Castro, 49 Cal. 325; ante, p. 56, note.

and is unassailable except by direct proceedings for its annulment or limitation.'[1]

The decisions of local supervisors in regard to the sufficiency of fences are held conclusive in Minnesota;[2] so of the reports of commissioners appointed to fix boundaries between towns in New Hampshire;[3] and so of decisions of county commissioners in Indiana in matters of drainage.[4] On the other hand, the decisions of municipal commissioners in Indiana appointed by virtue of statute to lay out streets and assess damages are not judgments of courts of justice.[5] But all that is a matter of statute, which of course might otherwise provide,[6] or be silent in regard to the effect of the proceedings.[7]

The award of arbitrators under an agreement which does not oust the jurisdiction of the courts,[8] if final and regular, is also in the absence of fraud conclusive upon the parties in respect of all questions properly brought before and considered by the arbitrators.[9] The case first cited was an action on a note against a prior indorser by a subsequent one, who had paid a judgment given by arbitrators in an action by the holder against all the indorsers; and as no technical issue had been joined, it was con-

[1] Steel *v.* Smelting Co., 106 U. S. 447, 450.

[2] Oxborough *v.* Borsser, 30 Minn. 1.

[3] Pitman *v.* Albany, 34 N. H. 577.

[4] Powell *v.* Clelland, 82 Ind. 24.

[5] Elkhart *v.* Simonton, 71 Ind. 7, 21, citing McMicken *v.* Cincinnati, 4 Ohio St. 394; In re Mt. Morris Square, 2 Hill, 14; In re Third Street, 6 Cowen, 571; Stafford *v.* Albany, 7 Johns. 541; In re Beekman Street, 20 Johns. 269.

[6] Logansport *v.* La Rose, 99 Ind. 117, 127. As to orders of commissioners of highways see Strong *v.* Makeever, 102 Ind. 578.

[7] In such case the proceedings would not have the effect of a judgment; and so a fortiori where the proceedings were not under statute. See Gaylord *v.* King, 142 Mass. 495.

[8] Pearl *v.* Harris, 121 Mass. 300.

[9] Lloyd *v.* Barr, 11 Penn. St. 41; Pease *v.* Whitten, 31 Maine, 117; Males *v.* Lowenstein, 10 Ohio St. 512; Burrows *v.* Guthrie, 61 Ill. 70; Snow *v.* Walker, 42 Texas, 154. An agreement to arbitrate, which ousts the jurisdiction of the courts, is void both at law and in equity. Pearl *v.* Harris, 121 Mass. 390; Wood *v.* Humphrey, 114 Mass. 185; Tobey *v.* Bristol, 3 Story, 800. But an agreement which merely suspends the action of the courts would not be within the rule. Thus, parties may enter into a valid agreement to arbitrate before, or as a condition precedent to, bringing suit. Scott *v.* Avery, 8 Ex. 487; s. c. 5 H. L. Cas. 811; Wood *v.* Humphrey, supra; Rowe *v.* Williams, 97 Mass. 163; Scott *v.* Liverpool, 3 De G. & J. 334; Jones *v.* St. Johns College, L. R. 6 Q. B. 115; Elliott *v.* Royal Assur. Co., L. R. 2 Ex. 237; Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. 597; Gray *v.* Wilson, 4 Watts, 39; Herrick *v.* Belknap, 27 Vt. 673; Hill *v.* Moore, 40 Maine, 515.

tended that the judgment was not an estoppel to the present defendant to deny demand and notice. But the court ruled otherwise.[1] Nor can the award of statutory or perhaps ordinary appraisers be attacked collaterally for mere error of judgment.[2] But it is proper to show that the arbitrators refused to consider a claim properly offered in the case,[3] or that a demand which might have been embraced within the arbitration was not laid before the board.[4] The awards of referees and auditors under appointment of the courts, after the award has been entered as a judgment of court, are binding, it seems, upon the same footing as ordinary judgments.[5]

An award not entered as a judgment of court is not in the full or, it should seem, proper sense a case of res judicata;[6] it is the result of an agreement between the parties, and has characteristics flowing from agreement quite as much as characteristics of a judgment. Thus, the question whether the award is binding will, from one point of view, depend upon the consideration whether it is in accordance with the submission, i. e. with the agreement to arbitrate; if it is in excess of the authority, it is without effect.[7] So, too, if on the face of the award it is obvious that it is founded in mistake of law or of fact,[8] at least if the mistake is gross, the award by the law of this country is not binding at law or in equity.[9] It is not enough, indeed, merely

[1] The opinion of the court was thus stated by Mr. Justice Bell: 'The now defendant had then a full opportunity to controvert his liability on the note in question, and to cross-examine the witnesses produced by the bank to prove it; a privilege which constitutes one of the principal tests of estoppel by judgment. The very point, too, to establish which that judgment is now pleaded, was then in issue. Notice to the defendants of the dishonor of the note was a material allegation of the narr. in that action. And though no technical issue was formed by a formal plea, there was a substantial one under our system of arbitration, requiring proof of everything necessary to show the bank's right to recover. Darlington v. Gray, 5 Whart. 487. The award of the arbitrators has therefore the same legal effect as the verdict of a jury and judgment thereon under an issue strictly made up.'

[2] People v. Schuyler, 69 N. Y. 242 (canal appraisers).

[3] Gaylord v. Norton, 130 Mass. 74.

[4] Lee v. Dolan, 39 N. J. Eq. 193. See Ravee v. Farmer, 4 T. R. 146; Golightly v. Jellicoe, ib. note; Webster v. Lee, 5 Mass. 334.

[5] See e. g. Blodgett v. Dow, 81 Maine, 197, putting the judgment on the same footing with judgments on verdict of a jury.

[6] Lanigan v. New York, 70 N. Y. 454.

[7] Boston Water Co. v. Gray, 6 Met. 131; Nickels v. Hancock, 7 De G. M. & G. 300.

[8] 2 Story, Equity, § 1453.

[9] Davis v. Henry, 121 Mass. 150;

to show, however clearly, that the arbitrators came either in law or in fact[1] to an erroneous conclusion; for the agreement to submit evidently implies the possibility of that. To impeach the award it should be shown, with regard to a case of mistake, that by reason of some error the arbitrators were so misled that they did not apply correctly the rules which they intended to apply,[2] or that there was some gross and obvious error in the result, as distinguished from a mere error in judgment, or perhaps that the arbitrators intended to decide according to the law and mistook the same.[3] And the award could, it seems, be collaterally impeached in such cases; clearly it could in an action upon the same.[4] It follows that fraud or other gross misconduct, misleading the arbitrators, will be ground for impeaching the decision.[5] Thus, if a party should procure the allowance of a claim before arbitrators, which he knows to be fictitious, effecting the result through fabricated testimony, or by withholding books or papers which would show the truth, the award may be set aside,[6] or doubtless in this country impeached in a collateral action.[7]

It is necessary as yet, no doubt, to speak with some caution concerning the collateral impeachment of awards for other causes than such as would avail against judgments; but still it seems reasonable to conclude that an award, not made a

Boston Water Co. *v.* Gray, 6 Met. 131, 169, 170; Withington *v.* Warren, 10 Met. 431; Strong *v.* Strong, 9 Cush. 560, 569; Cutting *v.* Carter, 29 Vt. 72; Matthews *v.* Matthews, 1 Heisk. 669. But comp. James *v.* James, 23 Q. B. D. 12, C. A.

[1] 2 Story, Equity, § 1454.

[2] Davis *v.* Henry, 121 Mass. 150; Boston Water Co. *v.* Gray, 6 Met. 131, 169; Carter *v.* Carter, 109 Mass. 306; Spoor *v.* Tyzzer, 115 Mass. 40; Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

[3] Boston Water Co. *v.* Gray, 6 Met. 131, 168.

[4] Boston Water Co. *v.* Gray, 6 Met. 131; Withington *v.* Warren, 10 Met. 431; Strong *v.* Strong, 9 Cush. 560. Most of the cases are proceedings to set aside the award, but Boston Water Co. *v.* Gray, supra, the most important perhaps of all, was an action upon an award (a collateral proceeding of course); and no distinction was made in the elaborate judgment of the court between collateral and direct impeachment. The same may be said of Withington *v.* Warren, and Strong *v.* Strong.

[5] Pickering *v.* Cape Town Ry. Co., L. R. 1 Eq. 84; Beddow *v.* Beddow, 9 Ch. D. 89; Cutting *v.* Carter, 29 Vt. 72; Boston Water Co. *v.* Gray, supra; Strong *v.* Strong, supra.

[6] Cutting *v.* Carter, 29 Vt. 72.

[7] See Boston Water Co. *v.* Gray, supra; Strong *v.* Strong, supra.

judgment of court, cannot take higher rank than a very deliberate contract to pay so much money, or to do or not to do a particular thing. It must be upon some such view, it would seem, that it is not considered necessary to have the award set aside even when only voidable, in order to impeach it in an action upon or concerning it. Indeed, it appears to be the substantial result of such authoritative cases as Boston Water Co. *v.* Gray [1] that when a contract could be reformed or avoided for mistake or fraud, an award may be impeached when sued upon. And it may be doubted whether an award, if not agreed to be under seal, would merge the original cause of action. The case, however, will be changed, it seems, when once the award is entered, at least after contest, as a judgment of court.

However all this may be, it seems clear that besides the objections available on the ground that the award originated in an agreement to submit to arbitration, any other objection that could be urged successfully against a judgment may be made. Thus, an award may be impeached collaterally as well as directly for corruption on the part of the arbitrators.[2] Indeed, evidence of conduct of a far less reprehensible character may afford a good defence in this country to an action upon an award. It is laid down that not corruption and fraud only, but also the exercise of undue or improper influence, applied by one of the parties upon an arbitrator, by separate conference or other approaches, is a defence to such an action.[3]

It would seem hardly necessary to state that a judgment of a court of last resort cannot be collaterally attacked, in regard to law [4] or fact, in that or in any other court; and it is remarkable that any question of the conclusiveness of such a judgment should ever have been raised. But questions of the kind have often been raised and a decision thereof made necessary.[5] It

[1] 6 Met. 131. Our authorities, as indicated by this case, perhaps go further than the English.

[2] Boston Water Co. *v.* Gray, 6 Met. 131; Strong *v.* Strong, 9 Cush. 560. So an injunction will be granted in such a case against enforcing the award. Pickering *v.* Cape Town Ry. Co., L. R. 1 Eq. 84; Beddow *v.* Beddow, 9 Ch. D. 89.

[3] Strong *v.* Strong, 9 Cush. 560, 574.

[4] Braden *v.* Graves, 85 Ind. 92, 96; Roberts *v.* Cooper, 20 How. 467.

[5] Sturgis *v.* Rogers, 26 Ind. 1; Braden *v.* Graves, 85 Ind. 92, 96; Hawley *v.* Smith, 45 Ind. 183; Dodge *v.* Gaylord,

was well said in Sturgis *v.* Rogers, just cited, that to say that a judgment of affirmance by the Supreme Court, when the parties were before the court and the case was brought within its lawful jurisdiction, was not an end of that litigation, would be a startling doctrine; asserting in effect that a cause could never have a termination.

§ 4. *Special Judgments (on the Merits) of the ordinary Tribunals.*

1. First of the conclusiveness of agreed, confessed, or consent judgments. In a case in Kentucky [1] the defendants pleaded that the same plaintiffs having formerly sued them upon the same cause of action, that suit was by the judgment of the court 'dismissed agreed.' The defence was held good. Chief Justice Robertson said that it had frequently been decided in that court that the legal deduction from a judgment dismissing a suit 'agreed' was that the parties had by their agreement adjusted the subject-matter of controversy; and that the legal effect of such a judgment was that it would operate as a bar to any other suit between the parties on the same cause of action thus adjusted and merged in the judgment at their instance.[2] The agreement, however, should be an agreement to terminate the controversy fully.[3]

53 Ind. 365: Sizer *v.* Many, 16 How. 98; Lucas *v.* San Francisco, 28 Cal. 591; Donnell *v.* Hamilton, 77 Ala. 610; Roundtree *v.* Turner, 36 Ala. 555; Camden *v.* Werninger, 7 W. Va. 528; Logansport *v.* Humphreys, 106 Ind. 146; New York Ins. Co. *v.* Clemmitt, 77 Va. 366; Miller *v.* Cook, ib. 806; Supervisors *v.* Kennicott, 94 U. S. 498; Chouteau *v.* Gibson, 76 Mo. 38, 51; Star Wagon Co. *v.* Swezy, 63 Iowa, 275.

[1] Bank of Commonwealth *v.* Hopkins, 2 Dana, 395.

[2] United States *v.* Parker, 120 U. S. 89; Dunn *v.* Pipes, 20 La. An. 276; Jarbor *v.* Smith, 10 B. Mon. 257; The Bellcairn, 10 P. D. 161, C. A.; Kronprinz *v.* Kronprinz, 12 App. Cas. 256, 259. See also Fletcher *v.* Holmes, 25 Ind. 458; Brown *v.* Sprague, 5 Denio, 545; Donnell *v.* Hamilton, 77 Ala. 610. But it is held that the mere words of record 'dismissed agreed' are not enough for the purposes of res judicata. It should be shown that it was agreed that the controversy should be fully terminated, otherwise the words will have no more effect than that of a nonsuit. Haldeman *v.* United States, 91 U. S. 584, a case from Kentucky, in which the Kentucky rule was considered. Davis, J.: 'There must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit.'

[3] Haldeman *v.* United States, supra. In Wohlford *v.* Compton, 79 Va. 333, the words 'dismissed agreed' were treated as a 'retraxit' and so held an estoppel. Ante, p. 56.

In Chamberlain *v.* Preble [1] the court said that it could make no difference that the facts, or some of them, had been agreed by the parties instead of being passed upon by the jury. Few trials before a jury were had without the agreement of parties or counsel to matters thought not to be in controversy. The execution of written instruments, the testimony of absent witnesses, and the date of the happening of particular events, were of this class. A mistake in the admission of any one such fact, if material, would be quite as fatal in its effects upon the conclusiveness of the judgment as an error in an agreed statement of facts.[2]

Indeed, it is commonly held in this country that where the agreement, confession, or consent is certain,[3] the judgment will be conclusive.[4] In Sheldon *v.* Stryker there was an attempt in a collateral action to impeach such a judgment, on the ground that it had not been confessed in conformity with the provisions of the statute; and in the court below the record had been excluded for the reason mentioned. But upon appeal it was held that the judgment was not absolutely void, and therefore that it could not be collaterally impeached, and should not have been rejected when offered in evidence.

A different rule prevails in England unless the suit was *dismissed* by agreement.[5] In a Scotch case before the House of Lords [6] it appeared that an action had been brought to have it declared that there existed a public right of way for foot-passengers along the right bank of the river Lossie. The land-

[1] 11 Allen, 370.

[2] See Cothran *v.* Brower, 75 Ga. 494; McCreery *v.* Fuller, 63 Cal. 30.

[3] Nashville Ry. Co. *v.* United States, 113 U. S. 261. The effect of a consent decree extends to all matters within the consent, whether litigated or not. Ibid.

[4] Sheldon *v.* Stryker, 34 Barb. 116; Neusbaum *v.* Keim, 24 N. Y. 325; Dean *v.* Thatcher, 3 Vroom, 470. See Snow *v.* Howard, 35 Barb. 55; North *v.* Mudge, 13 Iowa, 496; Twogood *v.* Pence, 22 Iowa, 543; Sherman *v.* Christy, 17 Iowa, 322; Whitaker *v.* Bramson, 2 Paine, 209; Secrist *v.* Zimmerman, 55 Penn. St. 446; Kirby *v.* Fitzgerald, 31 N. Y. 417; Weikel *v.* Long, 55 Penn. St. 238; Goff *v.* Dabbs, 4 Baxter, 300. See Alabama R. Co. *v.* South Alabama R. Co., 84 Ala. 570, decree pro confesso. Stay of execution being deemed a judgment by confession, the judgment is equally conclusive and cannot be impeached. Anderson *v.* Kimbrough, 5 Cold. 260.

[5] Kronprinz *v.* Kronprinz, 12 App. Cas. 256, 259; The Bellcairn, 10 P. D. 161, C. A., holding that the agreement could not afterwards be rescinded by consent of the parties, to the injury of others.

[6] Jenkins *v.* Robertson, L. R. 1 H. L. Scotch, 117.

owners appeared and defended, but a verdict went against them. The court having granted a new trial, a compromise was effected; and in pursuance thereof the court pronounced the judgment agreed upon. Subsequently the present action was brought, laying before the court the *same cause* which had been compromised; and the question arose whether the matter was res judicata. Lord Chancellor Chelmsford said that the judgment in the former action having been the result of compromise between the parties, it could not be considered as a judicium, nor could it be regarded as res judicata. Lord Romilly said that res judicata by its very words meant a matter upon which the court had exercised its judicial mind, having come to the conclusion that one side was right, and having pronounced a decision accordingly. And this was the opinion of the House of Lords. The weight of reasoning appears to be this way.[1]

The same would be true, a fortiori, in the case of such a judgment rendered without an issue.[2] The case cited was a suit to restrain an infringement of a patent against certain persons. Several years before, the plaintiff, having discovered the same firm (composed of the same persons, with two others who subsequently joined it) violating his patent, commenced an action against them for 41*s.* damages. They submitted, as they alleged, by arrangement to give judgment for 40*s.* and costs before any pleadings had been filed in the case. They immediately took a license from the plaintiff to use his patent for a certain time; and now he alleged further infringements. The plaintiff contended that the defendants were now estopped to contest the validity of the patent, by reason of the judgment mentioned; but the court held otherwise.[3]

[1] See to the same effect, White *v.* Buccleuch, 1 H. L. Scotch, 70; Lamb *v.* Gatlin, 2 Dev. & B. Eq. 37; Egerton *v.* Muse, 2 Hill, Eq. (S. Car.) 51; Wadhams *v.* Gay, 73 Ill. 415. See also Gay *v.* Parpart, 106 U. S. 679, 696, 698. It will be observed that such a judgment is less effective than a judgment by default.

[2] Goucher *v.* Clayton, 11 Jur. N. S. 107.

[3] Wood, V. C. said: 'I do not think that even if all the present defendants were parties to the record in the action a court of common law would have held, in a new action by the plaintiff, that there was an estoppel. There is no evidence of any issue between the parties. The defendants are supposed to say, "We thought it not worth our while to try the question, and we therefore did not raise the issue." They submitted and paid 40*s.* damages and costs, possibly because they might have been unwilling to give over working, or incur

2. Judgment by default[1] is virtually judgment rendered ex parte.[2] It is of course conclusive for its own purpose, for appearance or contest by a party served with process, or otherwise bound by notice, is unnecessary;[3] but it is laid down in England that such a judgment concludes the defendant only from denying the averments of the declaration and contesting the facts actually put in issue; and if he has omitted to plead a fact in confession and avoidance of the plaintiff's demand, he may afterwards plead it in another action by the same plaintiff in respect of the same subject-matter; as for subsequently accruing rent under the same lease upon which the first action was brought.[4] And the court in the case cited proceeded to say that the omission to plead a good defence would in no case of the kind prevent the defendant from pleading it in a second action.

The law of this country upon the subject is not perhaps entirely settled. The English rule, it will be noticed, goes only to the extent of allowing the party who made the default to avail himself afterwards of facts not actually or necessarily in issue in the cause that went by default. Facts in avoidance of the plaintiff's claim, if not pleaded, can be availed of under the rule; while facts directly in bar, such as payment, or probably in bar pro tanto, such as part payment, cannot, whether pleaded or not,

the expense of litigation. At any rate there appear to have been no pleadings in the action; and the defendants would not be estopped by their submission to the judgment unless the plaintiff had declared validly and they had pleaded, denying the infringement.' But further he said that he could not prevent the two defendants, who were not parties to the former action, from setting up the defence; and he must therefore hold that there was no estoppel.

[1] The term is here used broadly to include final decrees in equity pro confesso on default. Such are of course conclusive in collateral suits for their own purpose, that is, as to the facts clearly found. See Hefner *v.* New York Life Ins. Co., 123 U. S. 747, 756; Thomson *v.* Wooster, 114 U. S. 104, 111. But quære whether such a decree would conclude facts in the way of avoidance, concerning which the pleadings were silent?

[2] See Mass. Pub. Sts. c. 167, § 81.

[3] Aslin *v.* Parkin, 2 Burr. 665, 668; Lewis *v.* Board of Commissioners, 70 Ga. 486; Board of Commissioners *v.* Welch, 40 Kans. 767; Walsh *v.* McIntire, 68 Md. 402, 420. It is held that judgment by default in a suit not controverted, as e. g. in a suit alleging a partnership against the defendants, is an admission, and as such may be used, like any other admission, by third persons. Central R. Co. *v.* Smith, 76 Ala. 572. Secus if the suit was controverted, even under the general issue. Ibid.

[4] Howlett *v.* Tarte, 10 C. B. N. S. 813; Hanham *v.* Sherman, 114 Mass. 19. See also Williams *v.* Williams, 63 Wis. 58, a striking case.

be made use of by the defendant. The tendency of the later authorities in this country is towards the English rule in its first branch, to wit, permitting the subsequent use of facts in avoidance of the first action.[1]

On the other hand, cases, now however treated as overruled, have been decided in this country which allowed a defendant after judgment against him by default to maintain an action to recover the amount of a part payment not set up or allowed in the former action.[2] In Loring *v.* Mansfield[3] the plaintiff sued to recover the amount of a partial payment which he alleged he had made upon a note of his held by the defendant, and had not been allowed in a former suit brought by the present defendant upon the note. The present plaintiff appeared and defended that suit, but then said nothing of the alleged partial payment now in question. The court held that the action could not be maintained; distinguishing the case from the earlier cases of Rowe *v.* Smith[4] and Fowler *v.* Shearer.[5] The point of distinction was that in those cases the judgment was obtained by default; that 'there was a trust and confidence between the parties;' and that the defendant had a right to expect that the plaintiff in taking judgment would make the allowance of the payment. This distinction has, however, been disregarded in later cases of the same court, and the two cases above mentioned have been declared overruled.[6]

In a recent case before the Supreme Court of New York,

[1] Cromwell *v.* Sac, 94 U. S. 351, 356; Hanham *v.* Sherman, 114 Mass. 19; Harrison *v.* Phœnix Ins. Co., 83 Ind. 575, 577; Unfried *v.* Huberer, 63 Ind. 67. See Shirland *v.* First National Bank, 65 Iowa, 96. But see Ebersole *v.* Latimer, ib. 164. See also Adams *v.* Adams, 25 Minn. 72, where it is held that upon mere judgment by default in a suit on one of several promissory notes all tainted with the same illegality, the defendant may when sued upon another of the notes still avail himself of the defence. Hughes *v.* Alexander, 5 Duer, 488. With the case of defences to judgment by default in general should be compared cases of cross-demands hereafter to be examined at length. White *v.* Merritt, 7 N. Y. 352; Bodurtha *v.* Phelon, 13 Gray, 413; Ressequie *v.* Byers, 52 Wis. 650; Goble *v.* Dillon, 86 Ind. 327.

[2] Rowe *v.* Smith, 16 Mass. 306; Fowler *v.* Shearer, 7 Mass. 14; Smith *v.* Weeks, 26 Barb. 463.

[3] 17 Mass. 394.

[4] 16 Mass. 306.

[5] 7 Mass. 14.

[6] Fuller *v.* Shattuck, 13 Gray, 70. See also Sacket *v.* Loomis, 4 Gray, 148; Jordan *v.* Phelps, 3 Cush. 547; Greenabaum *v.* Elliott, 60 Mo. 25, 30; Decker *v.* Adams, 4 Dutch. 511, 514; Corey *v.* Gale, 13 Vt. 639, 645.

affirmed by the Court of Appeals,[1] the rule in Rowe *v.* Smith, with the distinction on which it was founded, is also rejected. In the New York case referred to the maker of a promissory note had made a partial payment upon it, which had not been indorsed. The payee sued upon the note and recovered judgment for the full amount, the maker not defending. A surety on the note, having paid the judgment, took an assignment of it and brought an action to recover the amount of the partial payment; but the court held the action not maintainable. The case of Smith *v.* Weeks[2] was overruled. The court said that this case found no support in New York or in England, or in any of the states to whose authorities they had been referred, except in Rowe *v.* Smith, which, as has been said, was considered as overruled.[3] 'The law,' it was said, 'cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the summons or complaint he had expressly notified this plaintiff he would do, namely, take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed.'

This appears to be the better opinion.[4] The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.[5] If this be not true, judg-

[1] Binck *v.* Wood, 43 Barb. 315; 37 How. Pr. 653, where it is stated that the judgment of the Supreme Court was affirmed in June, 1869. So in 1 Abb. N. Y. Dig. p. xxxiv, 2d ed.

[2] 26 Barb. 463.

[3] The following cases were cited: Tilton *v.* Gordon, 1 N. H. 33 (overruled by Snow *v.* Prescott, 12 N. H. 535); Broughton *v.* McIntosh, 1 Ala. 103; Mitchell *v.* Sanford, 11 Ala. 695; Loomis *v.* Pulver, 9 Johns. 244; White *v.* Ward, ib. 232; Battey *v.* Button, 13 Johns. 187; Walker *v.* Ames, 2 Cowen, 428; Dey *v.* Dox, 9 Wend. 129; Le Guen *v.* Gouverneur, 1 Johns. Cas. 436; Marriott *v.* Hampton, 7 T. R. 269; Kist *v.* Atkinson, 2 Camp. 63.

[4] Huffer *v.* Allen, L. R. 2 Ex. 14; Sutliff *v.* Brown, 65 Iowa, 42. See Engstrom *v.* Sherburne, 137 Mass. 152.

[5] See State *v.* McBride, 76 Ala. 51; McCalley *v.* Wilburn, 77 Ala. 549 (nil dicit, i. e. judgment without a plea); Barton *v.* Anderson, 104 Ind. 578; Shirland *v.* First National Bank, 65 Iowa, 96. The case of Ebersole *v.* Latimer, 65 Iowa, 164, goes too far. If the

ments by default are of little worth. The effect of the English rule in such cases is seen in the case of judgments by default against administrators. Thus, in the case of Rock *v.* Leighton [1] the plaintiff sued the defendant, a sheriff, for a false return. The fact was that the sheriff had returned a devastavit to an execution against the plaintiff as an administrator; he having suffered a judgment by default. The plaintiff contended that the sheriff should have returned nulla bona, instead of a devastavit. The court, however, ruled that the confession of judgment, or suffering judgment by default, in the case of an executor or administrator, was an admission of assets and estopped him to deny the fact. Judgment was therefore given for the defendant. The doctrine of this case is well settled.[2] It is, however, laid down for clear law by the Supreme Court of the United States that judgment by default admits the legality of the demand or claim in suit only for the purpose of the action, and that it does not make the allegations of the declaration evidence in an action upon a different demand;[3] by way, that is to say, of an estoppel by verdict.[4]

Of course nothing short of final judgment upon default can have conclusive effect. Thus, judgment by default of appearance of the defendant does not operate as a bar to another action until after the damages have been determined.[5] Whitaker *v.* Bramson involved a judgment under a rule of court authorizing the plaintiff, in an action of contract, to sign judgment against the defendant upon his omission to file an affidavit of defence, leaving the amount of the judgment indeterminate; and the court held that it was therefore only an interlocutory judgment, and did not work an estoppel to a new suit for the same cause.[6]

declaration set out no cause of action, there is no estoppel. Bosch *v.* Kassing, 64 Iowa, 312. Nor can the judgment be binding except in regard to matters properly averred in the declaration. Barton *v.* Anderson, 104 Ind. 578, citing Unfried *v.* Huberer, 63 Ind. 67, and other cases. Further in regard to judgments by default see Nemetty *v.* Naylor, 100 N. Y. 562.

[1] 1 Salk. 310; s. c. 1 Ld. Raym. 589.

[2] Leonard *v.* Simpson, 2 Bing. N. C. 176; s. c. 2 Scott, 355; Grace *v.* Martin, 47 Ala. 135. See also 2 Wms. Executors, 1953 (7th Eng. ed.).

[3] Cromwell *v.* Sac, 94 U. S. 350, 356.

[4] See post, p. 90.

[5] Whitaker *v.* Bramson, 2 Paine, 209.

[6] See further, as to judgment by default, Fagg *v.* Clements, 16 Cal. 389; Mailhouse *v.* Inloes, 18 Md. 328; Green *v.* Hamilton, 16 Md. 317, 329; Minor *v.* Walter, 17 Mass. 237; Brummagim *v.* Ambrose, 48 Cal. 366; Mason *v.* Patter-

3. Judgment in proceedings supplementary to the main judgment is also binding in collateral actions. Thus, if a judgment debtor be examined concerning his property before a court or referee on proceedings supplementary to execution, the order made by the tribunal before which the examination takes place, concerning the subject-matter, estops the parties from relitigating the same matter.[1]

4. Judgment on a writ of partition at common law works an estoppel concerning the transfer of title;[2] while partition in chancery does not deal with or decide questions of controverted title. A decree in chancery does not transfer or convey title even after the allotment of shares of the parties; the legal title remains as before.[3] In neither case does the judgment operate beyond the title held at the time of the suit; it does not affect a title afterwards acquired;[4] it is like judgments in general.

Judgment in partition binds parties only;[5] it may indeed conclude contingent interests of persons not in being, but this only in cases where the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise.[6]

son, 74 Ill. 191. Under statutes of Illinois judgment by default in a county court, for collection of taxes, is not conclusive. Gage *v.* Pumpelly, 115 U. S. 454.

[1] McCullough *v.* Clark, 41 Cal. 298.

[2] Gay *v.* Parpart, 106 U. S. 679. See Burroughs *v.* De Couts, 70 Cal. 361. Secus in Indiana under statutes. Luntz *v.* Greve, 102 Ind. 173; Elston *v.* Piggott, 94 Ind. 14. In that state, and probably in other states, it merely severs possession and awards to each tenant his part in severalty. Elston *v.* Piggott, supra. But title may there be put in issue and decided. Luntz *v.* Greve, supra, and cases cited.

[3] Gay *v.* Parpart, at p. 689, Miller, J.; De la Vega *v.* League, 64 Texas, 205, 215. See the second case for a further consideration of partition in equity.

[4] See Elston *v.* Piggott, 94 Ind. 14, 24, citing Miller *v.* Noble, 86 Ind. 527, and other cases, in regard to decrees; Bryan *v.* Uland, 101 Ind. 477. So of other judgments, e. g. in ejectment; they do not bar an after-acquired title. Burns *v.* Hodgdon, 64 Cal. 72; People's Bank *v.* Hodgdon, ib. 95; Embrey *v.* Palmer, 107 U. S. 3, 11. Contra where the after-acquired title was only a formal conveyance of the title already litigated. Phelan *v.* Tyler, 64 Cal. 84.

[5] Childs *v.* Hayman, 72 Ga. 791.

[6] Monarque *v.* Monarque, 80 N. Y. 320, 326, Andrews, J.; Mead *v.* Mitchell, 17 N. Y. 210; Brevoort *v.* Brevoort, 70 N. Y. 136. A tenant in common may by agreement estop himself to claim partition. Eberts *v.* Fisher, 54 Mich. 294; Avery *v.* Paine, 12 Mich. 540.

CHAPTER III.

JUDGMENTS IN PERSONAM.

In presenting this subject we have adopted the following divisions: —

1. Estoppel by former judgment; 2. Estoppel by former verdict; 3. The limits and operation of judgment and verdict estoppels; 4. Under what circumstances judgments may be impeached in collateral actions.

§ 1. *Former Judgment: Identity of Causes of Action.*

Judgment upon the merits of a cause in litigation rendered by any court of competent jurisdiction is a bar to all further litigation of the same claim or demand.[1] This rule gives rise to a defensive position called as a matter of pleading 'former judgment;' the essential and the characteristic feature of which consists in this, that it must be shown that there is identity between the present and the previous cause of action. By his plea the defendant says in effect that the plaintiff has on a previous occasion brought an action against him, or against one under whom the defendant claims, in respect of the very same cause now alleged; in which action judgment was given for the plaintiff or for the defendant, as the case may be. He demands to know why he should now be pursued again; 'nemo bis vexari debet pro una et eadem causa.' The question, then, to be decided is whether the two causes of action are the same; if they are not identical, the defence is not good. We now present some of the cases which illustrate or explain this point.

[1] See e. g. Cromwell *v.* Sac, 94 U. S. 351; Borer *v.* Chapman, 119 U. S. 587; Minneapolis Assoc. *v.* Canfield, 121 U. S. 295, 308; Wilson *v.* Deen, ib. 525; Bissell *v.* Spring Valley, 124 U. S. 215; Umlauf *v.* Umlauf, 118 Ill. 580; Thomas *v.* Merry, 113 Ind. 83, 91; Rogers *v.* Kimsey, 101 N. C. 559; Bickett *v.* Nash, ib. 579; Magnus *v.* Sleeper, 69 Wis. 219, 223.

The case of Cleaton *v.* Chambliss,[1] decided by the Virginia Court of Appeals, will serve to illustrate the subject. Apart from unnecessary details the case was this: Wessen being indebted to the plaintiff Chambliss, paid him by unnegotiable bonds purporting to have been executed to him (Wessen) by the defendant Cleaton and T C, the defendant having before the transfer promised the plaintiff that he would pay them. The defendant having failed to pay the bonds at maturity, Chambliss sued him upon them in Wessen's name; to which action the former pleaded non est factum, and obtained judgment on his plea. Chambliss then sued him on the special promise to pay the bonds. The defendant demurred to a count setting out the foregoing matters; and he contended inter alia that the judgment in his favor on the bonds was a complete bar to the action. But the demurrer was overruled.[2]

In a case before the Supreme Court of the United States[3] it appeared that the plaintiff had sued the defendant for salt sold and delivered. The defendant pleaded that having given in payment of the salt the note of a third party indorsed by himself, the plaintiff sued thereon, and judgment was given against him that the action could not be maintained until judgment had been obtained against the maker and his insolvency made to appear. But the plea was held bad. Chief Justice Marshall said it was clear that the same question was not tried in both cases. In the first case the point decided was that the suit against the indorser would not lie until a suit had been brought against the maker; in the second suit the point to be decided was whether the plaintiffs had lost

[1] 6 Rand. 86.

[2] After having considered the questions of pleading and other matters involved, the court by Carr, J. said that the record must also show that issue was taken on the same allegation which was the foundation of the second action. 'Here,' to quote the language of the court, 'the foundation of the action is the promise of Cleaton to Chambliss; there the foundation is the bond of Cleaton to Wessen. The issue there was upon non est factum; that was the point decided, the allegation taken and found; an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If then the judgment on the bonds had been pleaded the plea could not have availed; for if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of nul tiel record would have overthrown it.'

[3] Clark *v.* Young, 1 Cranch, 181.

their remedy on the original contract by their conduct respecting the note. These were distinct points; and the merits of the latter case were not involved in the decision of the former.

In the recent case of Goodrich *v.* City,[1] also before the Supreme Court of the United States, the appellants filed a bill to recover damages for the sinking of the steamer Huron in the Chicago River. The casualty had been effected by the steamer running against a sunken wreck. The libel alleged that it was the duty of the city to have the wreck removed, and that it was guilty of negligence in not having done so. It further alleged that the city entered upon the work of removal, but abandoned it before the work was accomplished. The defence among other things was a former judgment rendered in the Supreme Court of Illinois, in an action on the case between the same parties respecting the same injury.[2] The declaration in that case had set forth that it was the duty of the city to remove and prevent obstructions in the river; that the city assumed to discharge the duty and entered upon the work; that it had negligently suffered the obstruction of the wreck to remain, though knowing its character, and had neglected to place any signal near it to indicate its position; and that by reason of the premises the steamer Huron had run upon the sunken wreck. Counsel for the libellants contended that, as there was no specific allegation in the declaration that the city had undertaken to remove the particular wreck (the main charge in the libel), the case made in the first action was different from that in the present; and that the state court had merely decided that an action would not lie against the city for a simple *omission* to act, — for the mere non-assumption of the power conferred by the charter. The question of liability, in all cases where the city had elected to act and had entered upon and assumed the work, was still an open question. But the court by Mr. Justice Swayne said that upon a careful examination of the declaration and the libel they must hold that there was no such difference between the cases as to take the present action out of the operation of the principle of res judicata.

[1] 5 Wall. 566. [2] Goodrich *v.* City, 20 Ill. 445.

The plaintiff in Norton *v.* Huxley[1] brought an action for a tort, charging the defendant with having fraudulently induced him to take the assignment of an unfinished contract which proved unfortunate for him. In pursuance of this contract the plaintiff had furnished labor, materials, and money, for which the assignor of the contract had given him an order on the defendant, which the latter refused to accept. The defendant offered in bar of the suit the record of an action by the plaintiff against the defendant to recover for the services, materials, and money just mentioned, in which suit judgment had gone for the defendant. But the record was excluded. The court said that the former action was one of contract, in which a promise and a breach had been averred. This was an action for a tort, in which the plaintiff alleged that he had sustained damages by the fraudulent representations of the defendant. Proof which would fully support the one case would have no tendency to sustain the other, the questions involved being essentially unlike.

A judgment, however, for the defendant in an action for a false representation — the inducement to a contract, for example of soundness on an exchange of horses — is a bar to a subsequent action of contract on the defendant's warranty of the fact falsely stated at the time of the contract; the two causes of action are identical.[2] On the other hand, where an action ex contractu has been defeated by proof of some special agreement in regard to performance, the judgment will not bar an action by the same plaintiff upon the special agreement. Thus, in Harding *v.* Hale[3] it appeared that the plaintiff had previously brought an action for goods sold, which was defeated by the plea of a special promise by the defendant to pay certain debts of the plaintiff, as a partial payment of the goods. The present action being brought upon this special promise, the defendant pleaded in bar the judgment in the action for the goods sold in bar. But the court held the plea bad. Mr. Justice Thomas said that the first suit was not for the same cause of action, nor to be supported by the same evidence, as the second. The judgment

[1] 13 Gray, 285.
[2] Norton *v.* Doherty, 3 Gray, 372; Ware *v.* Percival, 61 Maine, 391.
[3] 2 Gray, 399.

in the first did not negative the cause of action relied upon in the second, but affirmed its existence and pointed the way to a better writ.

Again, in Fitch *v.* First National Bank[1] it appeared that one of a number of creditors, who were seeking to set aside certain conveyances of their debtor as fraudulent, had already obtained judgment against the debtor, and had levied upon one of the tracts conveyed; but it was held that the former judgment and proceeding did not estop him from maintaining (with the other creditors) the present suit. The second action was not to obtain another judgment upon his demand, but a decree setting aside the conveyances so as to make his execution available.

In like manner, where it appears that judgment went against a demandant in a writ of entry on the ground that his grantor was disseised at the time of delivering the deed, he may show in a later suit that he has since fortified his title in this respect.[2] So judgment for a defendant in ejectment because a deed upon which the plaintiff relied was defective, owing to a mistake in it, is no bar to a proceeding to have the mistake corrected and the land then adjudged to the plaintiff.[3] So also dismissal of a suit to enforce personal liability against the defendant for taxes is no bar to a suit to subject land of his under a statutory lien to the payment of the same taxes.[4]

The test referred to in some of these cases, whether the evidence, actually adduced or newly discovered,[5] which would support the one case would sustain the other, is a universal one when applied to the judgment rendered in the former action, and not merely to the plaintiff's cause of action as stated in his declaration.[6] The plaintiff's action may have been turned aside by evidence which prevented a direct judgment upon the merits

[1] 99 Ind. 443.

[2] Perkins *v.* Parker, 10 Allen, 22; Hawley *v.* Simons, 102 Ill. 115; ante, p. 56, note 2.

[3] Hawley *v.* Simons, 102 Ill. 115. See Houstoun *v.* Sligo, 29 Ch. D. 448.

[4] Biggins *v.* People, 106 Ill. 270.

[5] In re May, 28 Ch. D. 516. Newly discovered evidence affords no ground for a fresh action after judgment against the same plaintiff. Ibid.

[6] See, besides the cases referred to in the text above, Steinbach *v.* Relief Ins. Co., 77 N. Y. 498; Dawley *v.* Brown, 79 N. Y. 390; Stowell *v.* Chamberlain, 60 N. Y. 272; Miller *v.* Manice, 6 Hill, 114; Riker *v.* Hooper, 35 Vt. 457; Marsh *v.* Pier, 4 Rawle, 273; Motley *v.* Harris, 1 Lea, 577.

of his demand; and then, though the evidence in the second action, after the plaintiff has overcome the objection to the first, would have supported the first demand, there is of course no bar. Thus, as we have seen, if the former suit was defeated by a defect of title in the plaintiff, the judgment will not bar proceedings after the plaintiff's title has been perfected.[1] So too it is not enough to constitute an estoppel that the same facts must be used in the second action which were used in the first; for it may be that such facts constituted but one severable part of the plaintiff's whole demand.[2] Nor a fortiori is it enough that the two cases grew out of the same transaction or state of facts so as to require the same evidence to be produced in the second suit; for the objects and causes of action relating to the fact may be successive or otherwise different.[3] This will be seen in a class of cases now to be mentioned.

In the case of periodically recurring[4] liability, as in tax assessments or in debts due by instalment, a former judgment may or may not bar a subsequent action. It cannot be a bar to an action for a sum subsequently falling due, it would seem, when the former judgment was for the plaintiff.[5] And in the case of taxes the same must be true when the judgment was for the defendant, if there has since been any change of law or fact in respect of the defendant;[6] for generally speaking a judgment decides the rights of the parties only from the time of the writ or the time laid in the declaration.[7] If, however, there has been no change, judgment based solely upon the validity of the demand and not upon facts in avoidance, such as payment or com-

[1] Amesti *v.* Castro, 49 Cal. 325; Perkins *v.* Parker, 10 Allen, 22; ante, p. 56, note.

[2] Nathans *v.* Hope, 77 N. Y. 420. See also Lyon *v.* Robbins, 45 Conn. 513.

[3] As in the case of cross-demands or of an action for what *might* have been made a defence to the former suit, but was not required by law so to be used. See infra, pp. 174 et seq., where this subject is fully considered.

[4] Continuing damage is another thing, to be considered later.

[5] See Lake Shore Ry. Co. *v.* State, 46 Mich. 193; Hanham *v.* Sherman, 114 Mass. 19; Burritt *v.* Belfy, 47 Conn. 323; Secor *v.* Sturgis, 16 N. Y. 548. If, however, the plaintiff were to wait until the whole debt were due, he could ordinarily bring but one action. Burritt *v.* Belfy, supra.

[6] Davenport *v.* Chicago R. Co., 38 Iowa, 634.

[7] Drake *v.* Vorse, 42 Iowa, 653; Wisconsin *v.* Torinus, 28 Minn. 175, 180; Newington *v.* Levy, L. R. 7 C. P. 180.

promise, would doubtless operate as a bar. In the case of an action on a debt due by instalment, as for example on a promissory note, judgment against the validity of the main obligation itself, applying to all instalments alike, would preclude the obligee from suing upon any of the instalments;[1] but an adverse judgment based upon grounds relating merely to a particular instalment sued upon could not in principle bar an action on another of them.[2] Nor could a judgment, for example, in trespass bar an action for a previous demand distinct from the one sued upon, though of the same nature.[3]

It will be seen that the fact that the form of action and precise remedy sought are different in the two suits will not prevent the existence of an estoppel.[4] The estoppel grows out of matter of substance, and form has little, if anything, to do with it. This is believed to be true at the present time even in regard to matters of pleading, according to more widely prevailing modes.[5]

After what has been said it need hardly be added that, where the court had jurisdiction and the judgment was not 'concocted' in fraud, it is entirely conclusive upon the parties, and cannot be impeached in any collateral action either because, e. g. the law was incorrectly applied to the case, or because some statute under which the proceedings were taken, as, e. g. an insolvency statute, was unconstitutional,[6] or because the facts before the court were incorrectly found, or because the facts were not all known at the time. A recent case in the Court of Exchequer[7] shows in a very strong light how rigidly the English courts hold to the doctrine under consideration. It was an

[1] Cleveland *v.* Creviston, 93 Ind. 31; Strauss *v.* Murtief, 64 Ala. 299.

[2] So of a series of notes given by the same person. Felton *v.* Smith, 88 Ind. 149, 152; Gardner *v.* Buckbee, 3 Cowen, 120; post, p. 95. See further, concerning rights of action for recurring liability, Duncan *v.* Bancroft, 110 Mass. 267.

[3] De la Guerra *v.* Newhall, 55 Cal. 21.

[4] Edwards *v.* Baker, 99 N. Car. 258; Stowell *v.* Chamberlain, 60 N. Y. 272; Ware *v.* Percival, 61 Maine, 391.

[5] See chapter 22.

[6] Clay *v.* Smith, 3 Peters, 411; Chapman *v.* Forsyth, 2 How. 202; Baldwin *v.* Hale, 1 Wall. 223; Gilman *v.* Lockwood, 4 Wall. 234; Morse *v.* Lowell, 7 Met. 152; Bucklin *v.* Bucklin, 97 Mass. 256; Fogler *v.* Clark, 80 Maine, 237. The rule was at one time taken to be contra in regard to insolvency laws. Kimberly *v.* Ely, 6 Pick. 440; Agnew *v.* Platt, 15 Pick. 417.

[7] Huffer *v.* Allen, L. R. 2 Ex. 14.

action against the defendant for maliciously signing judgment for £28, the amount of the plaintiff's debt originally, after the present plaintiff, then defendant, had paid £10 on account of the same; and averring that the present defendant thereupon issued a writ of ca. sa. against the plaintiff, indorsed for £32, for the debt of £28 and costs, under which the plaintiff was arrested and compelled, in order to procure his discharge, to pay the full sum indorsed and the sheriff's fees. The declaration then alleged that at the date of the judgment only £18 were due, and claimed damages in respect of the £10 and extra fees incurred. The court held that the action could not be maintained while the judgment complained of remained in full force.[1] The American rule, on the whole, as we have seen, is to the same effect.[2]

It should be added that, in the silence of the record of a jury trial, evidence is admissible to show the ground of the verdict, or what was found; and the same is true of non-jury trials, and a fortiori of arbitrations.[3] Thus in Packet Co. *v.* Sickles the

[1] 'Our judgment,' said Kelly, C. B. 'must be for the defendants. I say so with regret, because no doubt if the act of the defendants was knowingly done, that is, if they knew that the debt was reduced below £20 at the time of signing the judgment, their act was highly unjustifiable. But we must here determine the legal question, which is whether the previous judgment . . . estops the plaintiff from bringing this action, the first step in which is to impeach that record. It is a simple and unanswerable argument against its maintenance that it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the record; which, while it stands, is as between them an evidence of incontrollable verity. . . . The then defendant now avers that the judgment was signed and the execution issued wrongfully and maliciously . . . and on this averment founds his action against the judgment creditor. But he cannot make this averment, and therefore cannot maintain this action, whilst the judgment, against which no averment can be admitted, stands as evidence that, when judgment was signed, the debt which the then defendant owed was £28, and not £18.' Bramwell, B. did not regret the result; the plaintiff himself had caused the difficulty by not pursuing the proper course. He should have had the judgment corrected.

[2] See ante, pp. 76–78.

[3] There are many illustrations. See Carter *v.* Shibles, 74 Maine, 273; Packet Co. *v.* Sickles, 5 Wall. 580; Cromwell *v.* Sac, 94 U. S. 351, 355; Campbell *v.* Rankin, 99 U. S. 261; Wilson *v.* Deen, 121 U. S. 525; Chicago R. Co. *v.* Schaffer, 123 Ill. 112, 121; Withers *v.* Sims, 80 Va. 651, 658; Allebough *v.* Coakley, 75 Va. 629; Fowlkes *v.* State, 14 Lea, 14; Bryan *v.* Malloy, 90 N. Car. 508; Morgan *v.* Burr, 58 N. H. 167; McCall *v.* Jones, 72 Ala. 368; Pruitt *v.* Holly, 73 Ala. 369; Foye *v.* Patch, 132 Mass. 105; Boynton *v.* Morrill, 111 Mass. 4; Hood

question of the proof of the identity of the contract sued upon with that involved in a former judgment arose; and it was determined that where the declaration in the former action, as set out in the record, alleged a special contract, without stating whether it was a written or parol contract, and where jurors in that action were brought to testify to the identity of that contract with the present, evidence was admissible on the other side that the contract was in parol.[1] It is held, however, that while evidence may be offered to identify the issues submitted, it is not proper to prove the course of action of the jury or what was considered by them.[2]

The doctrine in criminal law that no man shall be brought into jeopardy of his life more than once for the same offence,[3] or, as it is expressed in the Constitution of the United States,

v. Hood, 110 Mass. 463; Wood *v.* Jackson, 8 Wend. 10; Washington Packet Co. *v.* Sickles, 24 How. 333; Lawrence *v.* Hunt, 10 Wend. 80; Supples *v.* Cannon, 44 Conn. 424; Dutton *v.* Woodman, 9 Cush. 255; Bigelow *v.* Winsor, 1 Gray, 299. See also Phillips *v.* Berick, 16 Johns. 136; Perkins *v.* Walker, 19 Vt. 144; Gardner *v.* Buckbee, 3 Cowen, 121; Burt *v.* Sternburgh, 4 Cowen, 559. So, too, the judge may look into the pleadings of the former trial, though not fully set out in the plea of res judicata. Houstoun *v.* Sligo, 29 Ch. D. 448. See Boone *v.* St. Paul Foundry Co., 33 Minn. 253. Or into the authorized reports of a cause. Hood *v.* Hood, 110 Mass. 463. Formerly, it seems, evidence was not received to help out the record when silent, except perhaps in regard to matters without the issues. Sintzenick *v.* Lucas, 1 Esp. 43; Manny *v.* Harris, 2 Johns. 24; Meredith *v.* Santa Clara Assoc., 56 Cal. 178, 181. The burden of proof is of course upon the party alleging the decision of the fact in question. Pruitt *v.* Holly, 73 Ala. 369.

[1] Mr. Justice Nelson, speaking for the majority of the court, said: 'As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive per se, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact. But even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.'

[2] Crum *v.* Boss, 48 Iowa, 433; Lawrence *v.* Hunt, 10 Wend. 80.

[3] 4 Black. Com. 335. See United States *v.* Chouteau, 102 U. S. 603.

that no one shall be subject for the same offence to be twice put in jeopardy of life or limb,[1] has a close relation to this subject of estoppel by former judgment, and may be considered as the criminal law counterpart of the same doctrine. But the doctrine rests upon technical views of jeopardy and not upon the principle of res judicata,[2] and we shall not examine it with that minuteness which we have brought to the consideration of the preceding matters, but shall be content with a reference to some of the main features of the doctrine.

The bar of a former acquittal or a former conviction arises after the defendant was technically in jeopardy on the former trial; and jeopardy begins, according to the better authorities, when the petit jury is sworn.[3] When the jury, being full, is sworn and added to the other branch of the court, and all the preliminary matters of record are in readiness for the trial, the prisoner, according to the better opinion, has reached the jeopardy which protects him from a second trial.[4] Whatever is done thereafter is immaterial, so far as the question of another trial is concerned; the legal effect of the position of the defendant is to preclude another trial for the same offence. And this, too, though the attorney-general, by consent of the judge, enters a nol. pros., or though he withdraws a juryman and thus puts an end to the trial.[5] In some states, however, the jeopardy of the defendant is deemed not to exist until the case has been submitted to the jury for verdict.[6] But if after the case has thus been submitted the trial be terminated by the government for any cause not founded upon the invalidity of the proceedings, the effect is a virtual acquittal of the prisoner; and he may so plead upon any new prosecution for the same offence. We shall see in a subsequent part of this chapter that the rules relating to the binding effect of judgments in civil causes are quite different in this particular.

The case is different where the trial is terminated by an adju-

[1] Const. Amend. art. 5.

[2] Justice v. Commonwealth, 81 Va. 209, 217.

[3] Bishop, Crim. Law, §§ 856, 857.

[4] Bishop, Crim. Law, § 858.

[5] Ibid.

[6] Ibid. The reader is referred to the work cited for a further consideration of the subject. The question hardly comes within the scope of this work, and it will not be further pursued.

dication in relation to some defect in the record or proceedings, or in relation to some other preliminary or extraneous matter which prevents a trial upon the merits of the indictment. In such a case upon an adjudication appearing of record, that such fact exists, the rule of twice in jeopardy has no application; for in truth the defendant has not been in jeopardy at all.[1] This doctrine, it will be seen, is in strict accord with that in relation to civil judgments.

§ 2. *Former Verdict: Identity of Point in Issue.*

The class of cases now to be considered is that in which an estoppel arises regardless of any identity in the cause of action; the only requirement now being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases. In these cases the judgment operates as an estoppel in regard to those matters in controversy upon which, or upon the determination of which, the verdict or finding, as distinguished from the judgment itself, was rendered.[2] And the same is true though the former judgment was rendered on demurrer, if the demurrer was based distinctly upon specific facts constituting the merits of the case.[3] This may for convenience be called estoppel by 'former verdict.'

The subject came under consideration from the technical point of view of pleading in Betts *v.* Starr[4] in the Supreme Court of Connecticut. The plaintiff in that case brought an action of ejectment to recover possession of certain land mortgaged by the defendant to the plaintiff for the security of a certain promissory note specified in the mortgage deed. The defendant offered to prove that the note mentioned in the mortgage was usurious and void. The plaintiff objected on the ground that the defendant was estopped by a former judgment

[1] Bishop, Crim. Law, § 873.

[2] Cromwell *v.* Sac, 94 U. S. 350, 352; Davis *v.* Brown, ib. 423, 428; Bissell *v.* Spring Valley, 124 U. S. 225. See Hanna *v.* Read, 102 Ill. 596; Tilley *v.* Bridges, 105 Ill. 336; Strang *v.* Moog, 72 Ala. 460; Smith *v.* Kernochan, 7 How. 198.

[3] Bissell *v.* Spring Valley, supra, a demurrer to facts alleged concerning the issuance of certain municipal bonds, coupons of which were sued upon, on which demurrer judgment was rendered overruling the same; the judgment being held conclusive in a subsequent suit between the same parties on other coupons cut from the same bonds.

[4] 5 Conn. 550.

between the parties. From the record of the case referred to it appeared that the present plaintiff had brought suit on the note in question, that the defendant pleaded non assumpsit, that the issue of fact was whether the note had been given upon a usurious consideration, and that a verdict was given for the plaintiff. The debt not having been satisfied in that case, the present action was brought. The court held the judgment conclusive of the matter. Mr. Justice Bristol said that when the cause or object of two actions was different, though the matter in dispute was the same in both, the prior judgment was, indeed, no bar to a subsequent action; but the *verdict* might still be conclusive evidence upon the point in dispute. Commenting upon Lee *v.* Hopkins,[1] he said that no one could suppose that, whatever way the judgment or decree on the bill in chancery in the former action there had gone, it could have been pleaded in bar to the last action (covenant) between the parties. The object of the bill in chancery was to get money refunded, alleged by a purchaser of an estate to have been necessarily expended by him to free that estate from incumbrances which the seller was bound to remove. The object of the suit at law was to recover damages for not conveying the military lands which were to have been taken in part payment. Nothing could have been more distinct than the object of the two suits; and in no event could the decree have been pleaded in bar of the action at law. But the decree in chancery was held conclusive, by way of evidence, that Lee had discharged the incumbrances upon the estate; that being the matter directly adjudicated in the chancery suit. Several English cases were also cited in support of the doctrine.[2]

Upon this branch of the subject the Duchess of Kingston's Case [3] should be referred to. That was an indictment for bigamy against the Duchess of Kingston on the ground that at the time of her marriage with the Duke of Kingston she was the lawful wife of one Hervey, then living. She pleaded in defence a judg-

[1] 6 Wheat. 109.

[2] Aslin *v.* Parkin, 2 Burr. 665; Rex *v.* St. Pancras, Peake, 219; Marriott *v.* Hampton, 7 T. R. 269; 2 Phillipps, Evidence, 18, 19, 4th Am. ed.

[3] Everest & Strode, Estoppel, 410 (full report); 20 How. St. Tr. 355; 1 Leach C. C. 73; 2 Smith's Lead. Cas. 679, 6th Eng. ed.

ment obtained by her against Hervey in a suit for jactitation of marriage, — claiming and boasting a marriage with her, — whereby she was pronounced a spinster and free from all matrimonial alliance with Hervey 'as far as yet appeared.' The case having gone to the House of Lords, the lords spiritual and temporal ordered this question among others to be put to the judges, Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage was conclusive evidence so as to estop the counsel for the crown from proving the said marriage in an indictment for polygamy?

As one of the preliminary positions in the opinion of the judges Chief Justice De Grey said that, from the variety of cases relative to judgments being given in evidence in *civil* suits, these two deductions seemed to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties when coming incidentally in question in another court for a different purpose. Having stated that the Spiritual Court had exclusive jurisdiction of questions of marriage, though the temporal courts entertained such questions incidentally, and that the latter courts were bound by the adjudications of the former courts between the same parties, he then said that the case was different when the judgments of the Spiritual Court were involved in *criminal* cases; for then the parties were in all cases different. The king, he said, in whom the trust of prosecuting public offences was vested, was no party to proceedings in the Ecclesiastical Court, and could not be admitted to defend, examine witnesses, intervene in any way, or appeal. He then proceeded to say that whatever might be the doctrine in regard to the conclusiveness of a positive adjudication concerning marriage when involved in a criminal case, a cause of jactitation was different.[1]

[1] 'This,' he said, 'is ranked as a matrimonial cause, unless where the defendant pleads a marriage; and whether cause of defamation only, and not as a

Outram *v.* Morewood[1] is a leading case of high authority upon this subject.[2] The case was this: An action of trespass was brought for digging and getting out coals from a mine alleged by the plaintiff to be within and under his close, called Cowclose. The defendants pleaded and showed title by a regular chain in right of the wife from Sir John Zouch; and they averred that the coals in question were under the lands of Zouch, and were derived by bargain and sale to certain immediate bargainees, from them to the defendant, the wife, and were not within a certain exception named. To this plea the plaintiff replied, and relied by way of estoppel upon a former verdict obtained by him in an action of trespass brought by him against one of the defendants, the wife of the other defendant (she being then sole), in which he declared for the same trespass as now; to which the wife pleaded and derived title in the same manner as now by her and her husband, and in which she alleged that the coal mines in question in the declaration mentioned were at the time of making the above-mentioned bargain and sale by Zouch part and parcel of the coal mines by that indenture bargained and sold. And that upon this point, whether the coal mines claimed by the plaintiff and mentioned in his declaration

it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect; viz. that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears; leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause; and if such sentence is no plea to a new suit there . . . it cannot conclude a court which receives the sentence from going into new proofs to make out that or any other marriage. So that, admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all; and by the rule laid down by Holt, L. C. J. such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred that there was no marriage at any time or place because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true; it may be true that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.'

[1] 3 East, 346.

[2] See among many other cases so treating Outram *v.* Morewood, Pittapur *v.* Garu, L. R. 12 Ind. App. 16; De Mora *v.* Concha, 29 Ch. D. 268, C. A. (affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541).

were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed, an issue was taken and found for the plaintiff, and against the wife. The question was, in the language of Lord Ellenborough, 'whether the defendants, the husband and wife, were estopped by this verdict and judgment thereupon from now averring (contrary to the title so then found against the wife) that the coal mines now in question are parcel of the coal mines bargained and sold by the indenture above mentioned.' And it was held that they were.[1]

[1] In delivering the judgment of the court, Lord Ellenborough, C. J. said: 'The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding as an estoppel, and precluded from averring the contrary of what has been so found, the husband in respect of his privity, either in estate or in law, would be equally bound. Coke, Litt. 352 a. [See Lindsey *v.* Danville, 46 Vt. 144, 148.] . . . The question then is, Is the wife herself estopped by this former finding? In Brooke, tit. Estoppel, pl. 15; ibid. Estate, 158, it is said to be "agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land; so that a man may plead this as a party, or as heir, as privy, or by que estate." But if it be said that by the freehold coming in debate must be meant a question respecting the same in a suit in which the freehold is immediately recoverable, as in an assize or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title; and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close, reported in 3 Leon. 194, the defendant pleaded "that heretofore he himself brought an ejectione firmæ against the plaintiff of the same land in which the trespass is supposed to be done, and had judgment to recover, and demanded judgment if against, etc. It was moved that the bar was not good because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another," etc. [Staple *v.* Spring, 10 Mass. 72.] Quod curia concessit. But as to the matter the court was clear that the bar was good. And by Periam: "Whoever pleaded it, it was well pleaded; for as by recovery in assize the freehold is bound, so by recovery in ejectione firmæ the possession is bound." And by Anderson: "A recovery in one ejectione firmæ is a bar in another, especially, as Periam said, if the party relieth upon the estoppel." And afterwards judgment was given that the plaintiff should be barred. This, it will be recollected, was an action of ejectione firmæ, and not an ejectment moulded and regulated by rules of court as it is at present. The court very properly distinguishes there between what operates by way of bar to a future recovery for the same thing, and what by way of estoppel. That was the case of a mere recovery in ejectione firmæ without title alleged; and the plaintiff might, in respect of possession or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is not the

The case of Gardner *v.* Buckbee [1] will also illustrate the principle under consideration. That case was an action upon a promissory note. The defence was that the note was given in part payment of a vessel, and fraud was alleged in the sale; the vessel being at the time rotten and unseaworthy, to the knowl-

recovery, but the *matter alleged* by the party, and *upon which the recovery proceeds*, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' In considering the complaint of Lord Coke, Preface, 8 Rep., concerning the multiplicity of suits which 'can come to no finite end,' the Lord Chief Justice says: 'Neither, however, would a verdict and judgment in a real action operate by way of bar to future actions of trespass, or bring the parties "to the finite end" wished for by Lord Coke; because there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right (I mean a writ of right itself) a right of possession derived under the owner of the inheritance in fee simple, or those under whom he claims; which may enable a plaintiff in trespass to recover for an injury to his possession done by the very person in whose favor the absolute right of property shall have been so affirmed in a real action. A judgment, therefore, in each species of action is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided.' See Arnold *v.* Arnold, 17 Pick. 4; post, p. 98; Morse *v.* Elms, 131 Mass. 151; Young *v.* Pritchard, 75 Maine, 513, 517; Hanna *v.* Read, 102 Ill. 596; Tilley *v.* Bridges, 105 Ill. 136; Strang *v.* Moog, 72 Ala. 460; Kirkland *v.* Trott, 75 Ala. 321; Jenkins *v.* International Bank, 111 Ill. 462. After having considered several earlier cases (Ferrer's Case, 6 Coke, 7; Incledon *v.* Burges, 1 Show. 27; s. c. Comb. 166; Evelyn *v.* Haynes, Surrey Summer Assizes, 1782; Kinnersley *v.* Orpe, 2 Doug. 517), his lordship said: 'None of the cases, therefore, cited on the part of the plaintiff, negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies. The cases adverted to by Lord Holt, and which have been fully explained and enforced by the defendants' counsel, together with the other authorities on the subject of protestation and estoppel (cited from Bro. Abr., Protestation, pl. 9; Fitzherbert, Estoppel, pl. 20), are in our opinion, as well as upon the reason and convenience of the thing and the analogy to the rules of law in other cases, decisive that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch; and consequently that the plaintiff ought to recover.'

[1] 3 Cow. 120.

edge of the plaintiff. The latter admitted that the note in question was one of two notes, for the same amount, given as the consideration in the sale of the vessel. The defendant offered to prove in bar of the plaintiff's demand that the plaintiff had impleaded him in the Marine Court of New York City upon the other promissory note; that upon the trial of that suit the fraud of the plaintiff in the sale was the only point in question; and that judgment had been given for the defendant on the ground that the sale was fraudulent. The evidence was objected to on the ground that the cause of action was different in the former suit from that in the present, being upon another note. The court below ruled that the evidence was not sufficient to bar the plaintiff's demand; but upon appeal it was held that the evidence was conclusive. Mr. Justice Woodworth, speaking for the court, said it was clear that the question of fraud was tried between the parties in the Marine Court on one of the notes given in payment of the vessel. That court had concurrent jurisdiction; and the law (as stated on a previous page) was well settled that the judgment of a court of concurrent jurisdiction, directly upon the point, was as a plea a bar, or as evidence it was conclusive between the same parties, upon the same matter directly in question in another court.[1]

An illustration of this subject is found again in Edgell *v.* Sigerson.[2] That, too, was an action upon a promissory note. The plaintiff's petition stated that he had formerly brought suit to recover an instalment of interest on the same note; that the defendant then pleaded that the note had been fraudulently altered in regard to the payment of interest, but that the plaintiff recovered judgment. The defendant now admitted the execution of the note, but defended on the ground of the same alleged fraudulent alteration, insisting that the note had thereby become void. But the Supreme Court overruled the defence. Mr. Justice Richardson said that the integrity of the note was necessarily and directly in issue in the suit brought to recover the annual instalment of interest; and the judgment in that

[1] Duchess of Kingston's Case, 20 How. St. Tr. 355; 2 Smith's Lead. Cas. 679, 6th Eng. ed.; Wilson *v.* Deen, 121 U. S. 525; Cromwell *v.* Sac, 94 U. S. 350.

[2] 26 Mo. 583.

case, having been rendered by a court of competent jurisdiction, determined the question in relation to the alteration of the note, and was conclusive in the present case.[1]

In a case in Kentucky[2] it appeared that the defendant in a former action for work and labor done had pleaded a special contract with the plaintiff in regard to the services, and had averred a failure by the plaintiff to comply with it; but that upon issue joined on the point verdict and judgment were given for the plaintiff. The latter now brought the present action upon the special contract which the defendant had relied upon in the former suit; but the court held that the action could not be maintained. Mr. Justice Duvall said that on the former trial the plaintiff had not only repudiated the contract now sued upon, but he had actually denied its existence upon the record, and had only been enabled to obtain a verdict by that denial. It was a well-established rule of law that every material fact involved in an issue must be regarded as determined by the final judgment in the action, so as not to be a subject of trial in any subsequent proceeding between the same parties.

The principle under consideration is enforced again by the effect given to a judgment for the plaintiff in ejectment in a subsequent action by him for mesne profits. It was held by all the judges in the leading case of Aslin *v.* Parkin[3] that the tenant was concluded in such a case by the judgment, and could not controvert the title; and that consequently he could not controvert the plaintiff's possession, because his possession was part of his title.[4] The plaintiff, to entitle himself to recover in an ejectment, must show a possessory right not barred by the

[1] See, in regard to a common defence to a series of notes, Felton *v.* Smith, 88 Ind. 149, 152; Hazen *v.* Reed, 30 Mich. 331; ante, pp. 85, 86.

[2] Hanley *v.* Foley, 18 B. Mon. 519.

[3] 2 Burr. 665. See Harris *v.* Mulkern, 1 Ex. D. 31, 35.

[4] Kille *v.* Ege, 82 Penn. St. 102; Man *v.* Drexel, 2 Barr, 202; Benson *v.* Matsdorf, 2 Johns. 369; Jackson *v.* Randall, 11 Johns. 405; Emerson *v.* Thompson, 2 Pick. 473, 487; Walsh *v.* McIntire, 68 Md. 402, 420 (that the rule applies only to the term laid in the declaration). So, too, judgment for the plaintiff in replevin conclusively establishes the plaintiff's right to immediate possession at the time of the suit. Allen *v.* Butman, 138 Mass. 586. It does not show that the *taking* was unlawful, for the action lies for unlawful detention as well as for unlawful taking. Ibid.; Whitman *v.* Merrill, 125 Mass. 127.

Statute of Limitations. But of course the judgment, like all others, concluded the parties only in regard to the subject-matter of it; beyond the time laid in the demise it proved nothing at all.

The identity of the particular points in controversy in the two cases is often a matter for critical discrimination. Arnold *v.* Arnold[1] is an illustration; a writ of right, to which the defendant pleaded an action of trespass quare clausum fregit brought by one under whom he claimed, against the present plaintiff, and judgment against the plaintiff in respect of the same land. The plea alleged that the only question in issue there was the same as that now in controversy, namely, the right of property. There was also a plea of a former writ of entry sur disseisin between the parties to the first action mentioned. Both defences were overruled on the ground that the questions at issue were different.[2]

[1] 17 Pick. 4.

[2] Mr. Justice Putnam, who delivered the opinion of the court, said: 'The error lies at the threshold. It is in the assumption that the same cause of action was tried in the action of trespass quare clausum upon an issue of soil and freehold, and the same cause of action was tried in the writ of entry sur disseisin upon the issue of nul disseisin, as is to be tried in the writ of right; an assumption which must strike the mind of every lawyer as extraordinary. Who needs to be told that the plea of soil and freehold would be supported by a defendant who should prove an estate for his life in the locus in quo, or that in a writ of right the right of property is in question? Who needs to be told that the actions of trespass quare clausum fregit, and the various writs of entry, and the judgments upon them, affect only the right of possession and entry, and do not conclude as to the mere right? It will be answered that nobody doubts these general propositions, but that the pleas in bar aver that the very right of property was tried in the actions of trespass and entry before brought, and that the new demandant had no legal impediment from giving in evidence, in support of the issues joined in those actions, the same matters that he now has to establish his right of property. But how does that appear judicially? The plea avers that the fact submitted to the jury in the action of trespass, and on which the jury found a verdict, was the mere right of property. The issue to be tried was upon the soil and freehold; and the verdict followed the issue. If the verdict had been upon the mere right of property, it could not have warranted a judgment for the prevailing party on the issue of soil and freehold; for it might be that the plaintiff might have the right of property, and his adversary might have the right of possession. A man entitled to the herbage for the current season might well maintain trespass quare clausum fregit against the owner of the fee. The judgment in such action would conclude the parties as to the rights drawn into question by the pleadings, but no further. . . . In every

The rule in these and other cases, to state it formally, is that a matter of fact, or generally speaking of law, once adjudicated by a court of competent jurisdiction, concurrent or exclusive, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral [1] suit in the same or any other court, at law, in chancery,[2] in probate, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it;[3] and this too whether the subsequent suit is upon the same or a different cause of action.[4] The cases upon this subject are very numerous.[5] Nor does it matter that

action the verdict is conclusive as to the subject-matter of the suit, and any matter particularly put in issue and found by the jury; and it will not be competent for a party in any other action to deny or plead anything to the contrary of what has been so found and adjudicated. Thus, if the demandant in a writ of entry has a judgment against him by the tenant in a writ of trespass quare clausum fregit upon an issue of soil and freehold, he cannot be permitted to say that, at the time when the action of trespass was commenced, the soil and freehold were not in the tenant. So, if the tenant in a writ of right had before prevailed against the demandant in a writ of entry on a plea of nul disseisin, the demandant cannot be permitted to say, contrary to the verdict, that the tenant had disseised him. He must go to trial upon his writ of right with the disadvantages arising from the former verdict against him; and he must establish his right of property in the writ of right (which he was not called upon to establish in the former action), or he cannot prevail.' Referring to the language of Ferrer's Case, 6 Coke, 7, the learned judge said it was not perfectly exact to say that the same right, or the same matter, was tried in the higher action, in cases of consecutive remedies, which had before been tried in the lower action. The causes of action in trespass quare clausum fregit, and in the writs of entry, related to the right of possession and of entry; while in the writ of right the demandant counted upon a fee simple and a deforcement. It was true, indeed, that the question was concerning the same lands; and in this sense only was the same matter tried again, as each presented a different cause of action.

[1] A second appeal of a cause to the same court is collateral to the first, within the rule. Questions decided on the first appeal cannot be opened on the second. New York Ins. Co. *v.* Clemmitt, 77 Va. 366; Miller *v.* Cook, ib. 806; Supervisors *v.* Kennicott, 94 U. S. 498; Logansport *v.* Humphreys, 106 Ind. 146; Chouteau *v.* Gibson, 76 Mo. 38, 51; Davis *v.* McCorkle, 14 Bush, 746.

[2] The fact that a plaintiff is rendered incompetent to testify in a cause by the death of the opposite party, against such party's personal representative, is no reason why the judgment should not be conclusive, even in equity. Putnam *v.* Clark, 34 N. J. Eq. 532.

[3] Bigelow *v.* Winsor, 1 Gray, 299, 301; Fuller *v.* Eastman, 81 Maine, 284, 286.

[4] Quoted with approval, Corrothers *v.* Sargent, 20 W. Va. 351, 357; Poole *v.* Dilworth, 26 W. Va. 583, 593; McCoy *v.* McCoy, 29 W. Va. 794, 807.

[5] Balkum *v.* Satcher, 51 Ala. 81; Strang *v.* Moog, 72 Ala. 460; Wilkins *v.* Judge, 14 Ala. 135; May *v.* Marks, 74 Ala. 249; Pollard *v.* Hanrick, ib. 334; Baker *v.* Barclift, 76 Ala. 414; Morgan *v.* Burr, 58 N. H. 167; Muel-

the former judgment was rendered after the second action was begun,[1] though formerly the rule was otherwise in England;[2] nor that it is in conflict with another judgment between other parties.[3]

But though verdict estoppels apply in a different as well as in the same cause of action, it must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing, in another cause of action, the doctrines of law applied in the first. The facts decided in the first suit cannot be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted.[4] Thus, if a decree in a suit to declare a mortgage invalid proceed upon the constitutionality of a statute, the parties cannot afterwards deny the validity of the statute in question, when the mortgagee attempts to foreclose.[5] But it could hardly be true that they could not raise the question again in a suit upon a different subject-matter;[6] and the same would appear to be the case with regard to any other question concerning the state

ler *v.* Henning, 102 Ill. 646; Jenkins *v.* International Bank, 111 Ill. 462; Yeoman *v.* Younger, 83 Mo. 424; Clark *v.* Wiles, 54 Mich. 323; Kelley *v.* Donlin, 70 Ill. 378; State *v.* Ramsburg, 43 Md. 325; De Proux *v.* Sargent, 70 Maine, 266; Adams *v.* Cameron, 40 Mich. 506; Tilson *v.* Davis, 32 Gratt. 92; Western M. Co. *v.* Virginia Coal Co., 10 W. Va. 250; Hendrickson *v.* Norcross, 4 C. E. Green, 417; Baldwin *v.* McCrea, 38 Ga. 650; Tioga R. Co. *v.* Blossburg & C. R. Co., 20 Wall. 137; Aurora City *v.* West, 7 Wall. 82; Beloit *v.* Morgan, ib. 619; Goodrich *v.* City, 5 Wall. 566; Doyle *v.* Reilly, 18 Iowa, 108; Painter *v.* Hogue, 48 Iowa, 426; Allie *v.* Schmitz, 17 Wis. 169; Heath *v.* Frackelton, 20 Wis. 320; Smith *v.* Way, 9 Allen, 472; Jordan *v.* Faircloth, 34 Ga. 47; Demarest *v.* Darg, 32 N. Y. 281; Eimer *v.* Richards, 25 Ill. 289; Babcock *v.* Camp, 12 Ohio St. 11; Bell *v.* McCulloch, 31 Ohio St. 397; Sergeant *v.* Ewing, 36 Penn. St. 156; Cabot *v.* Washington. 41 Vt. 168; Lynch *v.* Swanton, 53 Maine, 100; Bunker *v.* Tufts, 57 Maine, 417; Garwood *v.* Garwood, 29 Cal. 514; French *v.* Howard, 14 Ind. 455; Shuttlesworth *v.* Hughey, 9 Rich. 387; Stewart *v.* Dent, 24 Mo. 111; Walker *v.* Mitchell, 18 B. Mon. 541; Bobe *v.* Stickney, 36 Ala. 482.

[1] Jenkins *v.* International Bank, 127 U. S. 484.

[2] Houstoun *v.* Sligo, 29 Ch. D. 448; The Delta, 1 P. D. 393, 404; Martin *v.* Walker, 60 Cal. 94.

[3] Scotland *v.* Hill, 112 U. S. 183.

[4] Bernard *v.* Hoboken, 3 Dutch. 412. See Boyd *v.* Alabama, 94 U. S. 645, 648. This includes the constitutionality of the law, as, e. g. an insolvency statute under which one has taken proceedings. Fogler *v.* Clark, 80 Maine, 237, and cases cited.

[5] McDonald *v.* Mobile Ins. Co., 65 Ala. 358.

[6] See Boyd *v.* Alabama, 94 U. S. 645, 648, where the point is not decided. The subject is not without its difficulties. See chapter 14, note.

of the law.[1] What is law for one must be law for all;[2] and there could be no advantage in extending the doctrine of res judicata to such cases. The court might deem it best to rely upon the maxim 'stare decisis' indeed; but that is another thing.[3]

It is to be observed that we have been speaking of verdicts at common law, or in cases in which the common law effect of the verdict is produced. Verdicts out of equity, e. g. stand upon a different footing, and might not be held conclusive in another suit between the parties.[4]

Judgment against several defendants cannot, however, determine the rights of the defendants inter sese. Thus, if judgment be given against several co-contractors, and satisfaction is obtained by one of them, he cannot use the judgment as binding evidence against the others of their liability to him to contribute. No such point was decided in the former action;[5] the judgment decided the existence and legality merely of the demand. The parties must be adversary.[6] So, too, though executors represent all parties in interest in a will, in proceedings for the probate thereof, still if two or more of the legatees or devisees have ad-

[1] Bernard *v.* Hoboken, 3 Dutch. 412.

[2] See South Ottawa *v.* Perkins, 94 U. S. 260; post, chapter 21, § 2.

[3] See the distinction as put in Stryker *v.* Goodnow, 123 U. S. 527, 538, 539; Chapman *v.* Goodnow, ib. 540; Litchfield *v.* Goodnow, ib. 549; McCormick *v.* Bauer, 120 Ill. 573.

[4] Burlen *v.* Shannon, 99 Mass. 200, 206. In this case Mr. Justice Foster, speaking for the court, said: 'The verdict [in an equity cause] is treated as weighty, but not always as conclusive evidence. In England and in many American courts the verdict is sometimes wholly disregarded, and a decree is entered in opposition thereto, where the court is clearly satisfied that the verdict is contrary to the truth as established by the whole body of evidence in the cause. Ansdell *v.* Ansdell, 4 Mylne & C. 449; Day *v.* Hartshorn, U. S. Dist. Court for R. I. 1855, before Pitman, J. quoting the opinions of Nelson, Curtis, Woodbury, and Sprague, JJ.; Pike *v.* Potter, U. S. Circ. Court, R. I. Dist. 1859, before Clifford and Pitman, JJ.; 2 Dan. Ch. Pr. 3d Am. ed. 1115 and notes.' See also Allen *v.* Blunt, 3 Story, 746; Franklin *v.* Green, 2 Allen, 519; Ross *v.* New England Ins. Co., 120 Mass. 118; Ex parte Morgan, 2 Ch. D. 72. In accordance with this intimation, the court, in Burlen *v.* Shannon, supra, declined to give to a verdict out of equity in another cause the same credit as would be given to a verdict at law. The difficulty, however, arose from the uncertainty of the verdict.

[5] McCrory *v.* Parks, 18 Ohio St. 1; Leinkauff *v.* Munter, 76 Ala. 194; Duncan *v.* Holcomb, 26 Ind. 378; Buffington *v.* Cook, 35 Ala. 312. See Lloyd *v.* Barr, 11 Penn. St. 41.

[6] Ibid.; Beveridge *v.* New York R. Co., 112 N. Y. 1, 19; Leinkauff *v.* Munter, 76 Ala. 194. See Cushing *v.* Laird, 107 U. S. 69, 80.

verse claims under the will, no decision on the question of probate will bind such claimants inter se.[1] Where, however, the respective rights of the parties are drawn in issue by them and adjudicated, the judgment is conclusive between them.[2]

The general rule above stated[3] is subject to one or two qualifications of importance. It is held that when a complainant in equity seeks the means of carrying into effect a decree or judgment rendered in another litigation (as e. g. between persons under whom the present parties claim) but not providing such means of execution, it devolves upon the complainant to show that the decree or judgment is right. So Lord Redesdale and the House of Lords held in the year 1820; so the Lord Keeper had declared in the year 1700; and so it has been laid down by other and later authorities.[4] The former decree or judgment, in this view, is to be taken unquestioned only when it can be carried into effect by virtue of some order or direction contained

[1] De Mora *v.* Concha, 29 Ch. D. 268, 303, affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541.

[2] Harmon *v.* Auditor of Public Accounts, 123 Ill. 122; Parkhurst *v.* Burdell, 110 N.Y. 386; Graham *v.* Railroad Co., 3 Wall. 704; Corcoran *v.* Chesapeake Canal Co., 94 U. S. 741; Louis *v.* Brown, 109 U. S. 162, 167; Leavitt *v.* Wolcott, 95 N. Y. 212; Demarest *v.* Darg, 32 N. Y. 281; Brown *v.* Mayor, 66 N. Y. 391; Torrey *v.* Pond, 102 Mass. 355. See Cushing *v.* Laird, 107 U. S. 69, 80. 'In chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.' Corcoran *v.* Chesapeake Canal Co., 94 U. S. 741, quoted in Louis *v.* Brown, 109 U. S. 162, 167, and again in Harmon *v.* Auditor of Public Accounts, supra. That was said in answer to the objection that certain trustees and others were all defendants to a former suit, and that *between them* no issue was raised and no adversary proceedings had.

[3] P. 101.

[4] Wadhams *v.* Gay, 73 Ill. 415 (consent decree; see, concerning this litigation, 8 Chic. L. News, 189); Gay *v.* Parpart, 106 U. S. 679, 699; Jenkins *v.* International Bank, 111 Ill. 462, 471; Hamilton *v.* Houghton, 2 Bligh, 169, 182, 193; Johnson *v.* Northey, Finch, Prec. Ch. 134. See also Lawrence *v.* Berney, 2 Rep. in Ch. 127; O'Connell *v.* McNamara, 3 Dru. & War. 411; Bean *v.* Smith, 2 Mason, 252, 299; Gibson *v.* Rees, 50 Ill. 383, 406, 410; Egerton *v.* Muse, 2 Hill, Eq. (S. Car.) 51; Lamb *v.* Gatlin, 2 Dev. & B. Eq. 37. Comp. the older view of foreign judgments: 'When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong.' Lord Hardwicke, 1 Eq. Cas. Abr. 83, pl. 3, quoted by Buller, J. in Galbraith *v.* Neville, 1 Doug. 5, note. But see chapter 6.

within itself. At all events, if by the pleadings of a party entitled to the benefit of a judgment, he, in seeking by a proceeding ab extra to enforce it, opens the judgment, it is open for general purposes, in the second proceeding; and the party opening it cannot insist upon the rule of res judicata, if the record of the judgment disclose error such as shows that there was no cause of action whatever.[1] So, too, it has recently been held that when a person partly opens in his pleadings the facts of a judgment on which he relies, he cannot object to the other party's treating the whole case as opened.[2]

We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them; the former operating as a bar to subsequent *actions* founded on the same demand; the latter operating as a bar to the further litigation of the special *findings* of the jury irrespective of the nature of the cause of action. These distinctions now disappear; and we shall have no further occasion to present the divisions separately, or by special designation.

§ 3. *The Special Effect and Operation of Judgment and Verdict Estoppels.*

First, of merger. It is a fundamental rule of law that a judgment for the plaintiff, if not void, merges his cause of action into the higher claim of a judgment debt. That is, it destroys the original demand, and the result is that if the plaintiff for any reason should sue thereon in a domestic court, or in a court of a sister state,[3] he could be met with a plea of the former judgment as well as if that judgment had gone against him.[4] And it matters not that the judgment is voidable; it is still binding for the purpose of all collateral actions,

[1] Brownsville *v.* League, 129 U. S. 493, 505, explaining, at pp. 504, 505, Harshman *v.* Knox, 122 U. S. 306, 319. That is the better rule.

[2] Weed *v.* Burt, 78 N. Y. 191.

[3] Bank of United States *v.* Merchants' Bank, 7 Gill, 415; McGilvray *v.* Avery, 30 Vt. 538; Green *v.* Starr, 52 Vt. 426; Hatch *v.* Spofford, 22 Conn. 485; Walsh *v.* Durkin, 12 Johns. 100. But see Mumford *v.* Stocker, 1 Cowen, 178; Griswold *v.* Hill, 2 Paine, 492; Andrews *v.* Smith, 9 Wend. 53. Comp. the rule of the Roman law. Ante, p. 40.

[4] Schuler *v.* Israel, 120 U. S. 506.

of which a suit upon the original cause of action would be one.

If it should be desirable to bring a new action, suit should be brought upon the judgment already obtained by the plaintiff. Care, however, should be taken before proceeding; for a new judgment would, it has been held, not only merge and destroy the old one, but would have the same effect upon all rights, such as liens upon land, created by the first judgment.[1] And there is authority for the proposition that this would be true even where the judgment sued upon was rendered (not in a foreign country, but) in a sister state.[2] Neither of these positions, however, is settled, as the cases cited in the notes below show. In those which dispute the rule of merger it is pointed out that that rule applies only in favor of a higher obligation over a lower, as where a sealed obligation is given for a simple contract debt; while in the case of the two judgments the obligations are of the same degree.[3]

A special phase of the doctrine of merger must now be considered. There has been some conflict of authority concerning the question whether a judgment against one of several joint contractors is a bar to a suit upon the same contract against all the co-contractors, or against all except the one first sued. The question received most thorough consideration in the English Court of Exchequer in the year 1844 in the case of King *v.* Hoare;[4] and though that case is in apparent conflict with one of the decisions of the Supreme Court of the United States[5] by Chief Justice Marshall, the rule laid down in the first-named case has become well settled with us.[6] The English case re-

[1] Gould *v.* Hayden, 63 Ind. 443, citing Purdy *v.* Doyle, 1 Paige, 558, 561; Denegre *v.* Hann, 13 Iowa, 240; Whiting *v.* Beebe, 7 Eng. (Ark.) 421, 549; Chitty *v.* Glenn, 3 T. B. Mon. 424; Frazier *v.* McQueen, 20 Ark. 68; Neale *v.* Jeter, ib. 98; Bank of United States *v.* Patton, 5 How. (Miss.) 200; Brown *v.* Clarke, 4 How. 4.

[2] Gould *v.* Hayden, 63 Ind. 443. Contra, Weeks *v.* Pearson, 5 N. H. 324. See Bank of Old Dominion *v.* Allen, 13 Rep. (Va.) 509.

[3] See Story, Conflict of Laws, p. 823, 8th ed., criticising the rule of merger in such cases.

[4] 13 Mees. & W. 494.

[5] Sheehy *v.* Mandeville, 6 Cr. 253.

[6] A judgment in a justice's court in Michigan in a suit against one of two joint debtors does not merge the demand. The cause may be sued over again against both. Holcomb *v.* Tift, 54 Mich. 647; Bonesteel *v.* Todd, 9 Mich. 371.

ferred to was an action of debt against Hoare, who pleaded that the contract alleged in the declaration was made by the plaintiff with the defendant *and one Smith* jointly, and not with the defendant alone, and that subsequently the plaintiff recovered a judgment against Smith for the same debt; and the plea was sustained.[1]

[1] 'It is remarkable,' said Parke, B., 'that this question should never have been actually decided in the courts of this country. There have been apparently conflicting dicta upon it. Lord Tenterden, in the case of Watters *v.* Smith, 2 Barn. & Ad. 892, is reported to have said that a mere judgment against one would not be a defence for another. My brother Maule stated, in that of Bell *v.* Banks, 8 Man. & G. 267, that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher, 1 Cromp. & M. 634, Bayley, B. strongly intimates the opinion of the Court of Exchequer that the judgment against one was a bar for both of two joint debtors, though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, transit in rem judicatam, the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action being single, cannot afterwards be divided into two. Thus, it has been held that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause. Broome *v.* Wooton, Yelv. 67; s. c. Cro. Jac. 73; Moore, 762. (*a*) And though in the report in Yelverton expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet upon a comparison of all the reports it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham, Cro. Jac. 74, states the true ground. He says: "If one hath judgment to recover in trespass against *one*, and damages are certain" (that is, converted into certainty by the judgment), "although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, e contra, if one hath cause of action against two and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case

(*a*) This doctrine has recently been reaffirmed in England. Brinsmead *v.* Harrison, L. R. 6 C. P. 584. But the rule is otherwise in America. Post, p. 112.

In accordance with the principle in King *v.* Hoare it was held, where a vendor brought an action and recovered judgment

and the case of debt and obligation against two is because there every of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction." And it is quite clear that the chief justice was referring to the case of a joint and *several* obligation, both from the argument of the counsel as reported in Cro. Jac. and the statement of the case in Yelverton. We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other; but for the purpose of this decision they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action. The distinction between a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond; which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by Bayley, B. in the case of Lechmere *v.* Fletcher, 1 Cromp. & M. 634, and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he would be deprived of the right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule that an action on a joint debt barred against one is barred altogether; the only exception now being when one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement both must be joined, and that, if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one or two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that when judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party. During the argument a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being contrary to the conclusion this court has come to; the case is that of Sheehy *v.* Mandeville, 6 Cranch, 253. We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and

against one of several partners, that the partnership debt was merged in the judgment, so that there could be no proof upon it against the joint estate in bankruptcy; the partners having failed, and execution upon the judgment having been defeated by an adjudication in bankruptcy.[1]

in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar.' Ward *v.* Johnson, 13 Mass. 148.

In the case referred to, Sheehy *v.* Mandeville, 6 Cranch, 253, decided by Chief Justice Marshall, the facts and issue were these: The plaintiff, having sold goods to R. B. Jamesson, one of the defendants, took his note for the sum due. Afterwards suspecting that the other defendant, Mandeville, was a partner, he instituted this suit on the note against the two, charging the note to have been made by both trading under the firm name of R. B. Jamesson. Mandeville, among other things, pleaded that judgment had been rendered on the note against Jamesson; and the question arose under this plea whether that judgment was a bar to the present suit, as against Mandeville. Marshall, C. J. speaking for the court, said: 'Were it admitted that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could originally be maintained against him, is the note, as to him, also merged in the judgment? Had the action in which judgment was obtained against Jamesson been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.' This decision has been criticised by other courts than those above mentioned. See Robertson *v.* Smith, 18 Johns. 459; Trafton *v.* United States, 3 Story, 646; Brown *v.* Johnson, 13 Gratt. 644. But perhaps it may be sustained on the ground that the note contract was regarded as several as well as joint. In a subsequent case in the Supreme Court of the United States, United States *v.* Price, 9 How. 83, Mr. Justice Grier, who was speaking for the court, said that Sheehy *v.* Mandeville, 'though sometimes criticised and doubted in other courts, goes no further than to decide that where one partner is sued severally on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint, promise.' The English doctrine in King *v.* Hoare, lately reaffirmed in Kendall *v.* Hamilton, 4 App. Cas. 504, may now be considered as well settled here at common law. Sessions *v.* Johnson, 95 U. S. 347; United States *v.* Ames, 100 U. S. 35, 44; Mason *v.* Eldred, 6 Wall. 231; Gibbs *v.* Bryant, 1 Pick. 118; Robertson *v.* Smith, 18 Johns. 459; Clinton Bank *v.* Hart, 5 Ohio St. 33; Bowen *v.* Hastings, 47 Wis. 232, 236.

[1] Ex parte Higgins, 3 De G. & J. 33. See Peters *v.* Sanford, 1 Denio, 224.

The doctrine of King *v.* Hoare must not, however, be taken as unlimited. Several cases[1] of high authority have recently touched upon the subject, and fortified an exception which appears to have long prevailed in equity, 'to the effect that when one member of a firm has died, though at law the debt would from that time forth be only the debt of the survivors, in equity recourse might always be had to the estate of the deceased partner.'[2] It was accordingly held in the case last cited that judgment against the surviving partner will not bar proceedings against the estate of the deceased partner; and that it matters not which is first made liable. It is not to be understood from this that equity treats the partnership debts otherwise than as joint; the debts are still deemed joint in equity, 'though it will allow the separate remedy.'[3]

The converse, too, of this rule is equally true. In Olcott *v.* Little[4] an action was brought against the defendant as surviving promisor of one Slyfield. The defence was a judgment against Slyfield in a suit commenced against him and the present defendant on the same cause of action. But it appeared that in regard to the latter the writ was returned non est inventus; and that Slyfield having afterwards died, the present action was brought and service obtained upon the defendant. The court held that the judgment was no defence. Mr. Justice Upham, admitting the general rule in regard to judgments upon joint contracts, said that it was subject to exceptions wherever the necessity of the case required a separate suit to be brought. In the present instance a sufficient excuse appeared for the several character of the action heretofore brought against Slyfield, so as not to manifest an election to proceed against him to the discharge of the present defendant; and the excuse arose from the fact that but one of the defendants in the former suit was within the jurisdiction.[5]

[1] Kendall *v.* Hamilton, 4 App. Cas. 504; In re Hodgson, 31 Ch. D. 177; Liverpool Bank *v.* Walker, 4 De G. & J. 24.

[2] Sir J. Hannen in In re Hodgson, at p. 184.

[3] Lord Justice Bowen in the same case. Of course judgment against a surviving member of a partnership does not conclude the representative of the deceased partner. Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

[4] 9 N. H. 259.

[5] See also to the same effect Tap-

The rule in King *v.* Hoare is not applicable where the judgment has been rendered in favor of a joint obligor defendant unless it was upon a plea which would operate as a discharge to all.[1] In the case first cited an attorney sued for counsel fees; whereupon the defendants pleaded that the cause of action arose upon a joint retainer by the defendants and one J B, and alleged by way of estoppel a suit by the plaintiff against the said J B for the same counsel fees now in question, in which judgment was given for J B. The plaintiff entered a demurrer; and the court sustained it.[2]

Again, judgment against liability upon a joint promise alleged to have been made to three is no bar to a suit upon the promise as made to two of the three. Lawrence *v.* Vernon[3] was an action of assumpsit by two plaintiffs to recover money alleged to be due for widening the lower end of a certain street. The defence was that the same plaintiffs with one other had previously brought an action for widening both ends of the street, and recovered judgment; the jury specially finding 'that the defendant promised so far as to make himself liable for the damages incurred by widening the *upper* part' of the street. The defendant contended that this judgment concluded the plaintiffs, as the declaration in the former suit embraced the widening of both ends of the street; and the jury by their verdict had negatived the claim as to the widening of the lower end. But the defence was held insufficient. The learned judge said that the case was to be distinguished from Hitchin *v.* Campbell,[4] the rul-

pan *v.* Bruen, 5 Mass. 193; Dennett *v.* Chick, 2 Greenl. 191. It is also held that an unsatisfied judgment against one joint promisor is no bar to a suit against the other who was at the time of the suit out of the country and a non-resident. Tibbetts *v.* Shapleigh, 60 N. H. 487.

[1] Phillips *v.* Ward, 2 Hurl. & C. 717; Neville *v.* Hancock, 15 Ark. 511.

[2] Bramwell, B. said: 'No doubt if a person jointly liable with others succeeds in an action against him alone, by pleading a release or payment, that would afford a good defence to an action against the other joint debtors; . . . for a release to one is a release to all, and payment by one is a discharge of all. Therefore, in some cases, a judgment recovered by one of several joint debtors may be pleaded in an action against the others. But this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors; but only that the court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency.'

[3] 3 Sum. 20.

[4] 2 W. Black. 779, 827.

ing in which was approved. The parties were not the same; the causes of action were not the same. The parties plaintiffs in the former case were Lawrence, Adams, and Lamb; in the present suit Lawrence and Adams only. In the former suit the promise was alleged to have been made to three persons; and unless a joint promise was proved to all three that action was not maintainable. Nothing was better settled than that in assumpsit on a joint promise to three a promise to all jointly must be proved. A promise to two or one of the plaintiffs would not be sufficient; and therefore a promise to Lawrence and Adams alone, in the former suit, would not have entitled the plaintiffs to a verdict. The verdict in that suit might have proceeded upon the very ground which would now entitle the plaintiffs to recover, namely, that the promise in regard to the lower end of the street was to Lawrence and Adams alone, and not to the three who were then suing. And that finding he considered as altogether consistent with the demand now made by the two plaintiffs.[1]

In another case,[2] a suit upon a joint and several promissory note, the defendant pleaded that in a former action the plaintiff had impleaded him and the other joint and several makers of the note; and that the other defendants had pleaded the general issue, and obtained judgment. The plaintiff replied alleging matter to show that, though the other joint and several makers had been discharged, the present defendant was still liable. There was a demurrer to the replication, but it was overruled. The court said that the questions were not identical; that in

[1] The learned judge also stated his acquiescence in the test as generally true that it would determine whether the causes of action were the same if the same evidence would support each case. Martin *v.* Kennedy, 2 Bos. & P. 71. But even tried by this test the defence must fail. The evidence necessary to sustain the former action was the proof of a joint promise to the three plaintiffs; evidence of a promise to pay two would not suffice, but it would clearly sustain the present case. The infirmity of the defendant's argument was that it confounded the evidence offered in an action conducing to establish the facts necessary to support it with the evidence indispensable to support it in point of law. Evidence might be offered in a clause conducing to prove a promise to three, and yet it might only prove a promise to two; and the law in such case holds that the evidence of a promise to two would not support an action by the three. See also Fifield *v.* Edwards, 39 Mich. 264.

[2] Stingley *v.* Kirkpatrick, 8 Blackf. 186.

the present action the question was whether one was liable, while in the former action the question was whether three were liable. If it had been shown that the note was void for want of consideration, or if any other reason going to show a discharge of all existed, the defendant would not now be liable; but the replication showed that the former judgment had not determined the question of the liability of the present defendant.

Upon a similar principle, where judgment had been given against a joint attempt of two to restrain the enforcement of a judgment against them, it was held that the later judgment was no bar to a separate action by one of the two to enjoin enforcement of the earlier judgment, on grounds personal to himself. It was observed by the court that in the joint action to restrain the enforcement of the judgment the parties could only avail themselves of joint causes of action; neither of them could have set up a separate release not available to the other.[1]

The parties maker and indorsers of a note, or drawer, acceptor, and indorsers of a bill, of course are not joint parties, nor is there any privity between them in the sense of the law of estoppel; and hence concurrent or successive actions may be maintained against them all by the holder, though he can have but one satisfaction.[2] And in Neville *v.* Hancock this doctrine was held good in an action against the maker and indorser of a note jointly. It was decided that the maker was not discharged by the failure of the indorsee to make a case against the indorser.

The case of United States *v.* Price,[3] already referred to, is worthy of further notice upon a kindred point. The main point determined in the case is foreign to the subject of estoppel; but it became necessary to the determination of the case to consider whether a joint judgment upon a joint and several bond was a bar and satisfaction of the same. The court said that the law was too well settled to admit of a doubt or to require a citation of authorities, that if two or more are bound jointly and sever-

[1] Bilsland *v.* McManomy, 82 Ind. 139.

[2] Goodman *v.* Niblack, 102 U. S. 556; Bishop *v.* Hayward, 4 T. R. 470; Britten *v.* Webb, 2 Barn. & C. 483; Burgess *v.* Merrill, 4 Taunt. 468; Farwell *v.* Hilliard, 3 N. H. 318; Porter *v.* Ingraham, 10 Mass. 88; Neville *v.* Hancock, 15 Ark. 511.

[3] 9 How. 83.

ally, the obligee might elect to sue them jointly or severally; but having once obtained a joint judgment, the bond was merged in the judgment. It was essential to an election that the party could not have both. One judgment against all or each of the obligors was a satisfaction and extinguishment of the bond. It no longer existed as a security, being superseded, merged, and extinguished in the judgment. The creditor had no longer any remedy either at law or in equity on his bond; his remedy was on the judgment. By this the obligor was now bound, and not by the bond. The creditor having elected to obtain a joint judgment could not therefore sue the obligors severally.[1]

A tort committed by more than one person is in America, contrary to the English rule, regarded as joint and several in nature; giving remedies against each of the tortfeasors separately, or against all jointly.[2] And hence conversely judgment against one will not estop another to deny the cause of action against him. Thus, judgment in trespass quare clausum fregit against one co-tenant will not estop another, when subsequently sued as a participant, from claiming the whole land.[3] But satisfaction in favor of one is satisfaction in favor of all; and the same is true pro tanto of partial satisfaction.[4] It is, however, sometimes a point of difficulty to determine whether the parties are joint trespassers. In Stone *v.* Dickinson, just cited, the plaintiff had been arrested by the same officer on nine different writs in favor of different creditors. The writs were all served at the same time; and the plaintiff was finally released from jail by reason of defects in all the writs. The defendant offered evidence of a discharge to others of the creditors in bar of the action. The evidence was rejected in the court below; but on appeal it was held admissible.[5]

[1] United States *v.* Cushman, 2 Sum. 426, was directly overruled by this case.

[2] Lovejoy *v.* Murray, 3 Wall. 1; Sessions *v.* Johnson, 95 U. S. 347; Luce *v.* Dexter, 135 Mass. 23; Stone *v.* Dickinson, 5 Allen, 29; Brown *v.* Cambridge, 3 Allen, 474; Elliott *v.* Hayden, 104 Mass. 180; Sheldon *v.* Kibbe, 3 Conn. 214; Morgan *v.* Chester, 4 Conn. 387; Gilbreath *v.* Jones, 66 Ala. 129; United Society *v.* Underwood, 11 Bush, 265; Knott *v.* Cunningham, 2 Sneed, 210. See Lee *v.* West, 47 Ga. 311.

[3] Williams *v.* Sutton, 43 Cal. 65.

[4] Stone *v.* Dickinson, supra; United Society *v.* Underwood, supra; Luce *v.* Dexter, supra.

[5] Mr. Chief Justice Bigelow, speaking for the court, said: 'It cannot be

Secondly, of parties. It is a general principle, apart from the doctrine of merger, fundamental to the doctrine of res judicata, that personal judgments conclude only the parties to them and their privies. The bar must be mutual to the parties in the

denied that the parties who were plaintiffs in the original actions, in suing out their writs against the present plaintiff and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression it might seem that the legal inference from this fact is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers in the absence of proof of any intention to act together or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. . . . The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful and unlawful act committed by a common agent acting for several and distinct principals. It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers by whom the tortious act was done were the agents of several different plaintiffs who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done so as to entitle the party injured to a compensation graduated, not according to the damages sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him and caused him to be arrested and imprisoned cannot be regarded as co-trespassers, because it does not appear that they acted in concert or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable. . . . He may, it is true, have a good cause of action against several persons for the same wrongful act and a right to recover damages against each and all therefor with a privilege of electing to take his satisfaction de melioribus damnis. . . . But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages against him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others.'

later action.[1] 'Parties,' says Greenleaf, 'in the larger legal sense, are all persons having a right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies;'[2] and it may be added, those who *assume* such a right.[3] The rule includes, among defendants, not only persons duly served with process, but also all such as have by appearance waived want of service.[4] It

[1] Petrie *v.* Nuttall, 11 Ex. 569; Springport *v.* Teutonia Bank, 75 N. Y. 397; Bissell *v.* Kellogg, 65 N. Y. 432; Fisher *v.* Banta, 66 N. Y. 468; Raymond *v.* Richmond, 78 N. Y. 351; Goodman *v.* Niblack, 102 U. S. 556, 562; Railroad Co. *v.* National Bank, ib. 14; Davis Machine Co. *v.* Barnard, 43 Mich. 379; Buttrick *v.* Holden, 8 Cush. 233; McDonald *v.* Gregory, 41 Iowa, 513; Stoddard *v.* Burton, 40 Iowa, 582; Hine *v.* K. & D. R. Co., 42 Iowa, 636; Stoddard *v.* Thompson, 31 Iowa, 80; Goodnow *v.* Litchfield, 63 Iowa, 275; Betts *v.* New Hartford, 25 Conn. 180; Hutchinson *v.* Bank of Wheeling, 41 Penn. St. 42; Peebles *v.* Pate, 90 N. Car. 348; Meltzer *v.* Doll, 91 N. Y. 365, 373; Quigley *v.* Mexico Bank, 80 Mo. 289, 296; Young *v.* Stoutz, 74 Ala. 574; Cain *v.* Sheets, 77 Ala. 492; Dooley *v.* Potter, 140 Mass. 49; Salem *v.* Eastern Railroad, 98 Mass. 431, 446; McMahon *v.* Merrick, 33 Minn. 262; Dodd *v.* Una, 40 N. J. Eq. 672, 722.

It is difficult to understand Board of School Directors *v.* Hernandez, 31 La. An. 158, or Louisiana Levee Co. *v.* State, ib. 250, or Folger *v.* Palmer, 35 La. An. 473. The same must be said of Hill *v.* Bain, 15 R. I. 75; the cases cited by the court in no way support the decision. They are such cases as that of principal and agent. See post, pp. 120 et seq. It would be better to look for light to cases like Pim *v.* Curell, 6 Mees. & W. 234, and Neill *v.* Devonshire, 8 App. Cas. 135, 147; ante, p. 36, note 4. Such estoppels are, indeed, odious.

[2] 1 Greenleaf, Ev. § 535; Litchfield *v.* Goodnow, 123 U. S. 549; Duchess of Kingston's Case, Everest & Strode, Estoppel, 421.

[3] Stoddard *v.* Thompson, 31 Iowa, 80; Landis *v.* Hamilton, 77 Mo. 554; Winchester *v.* Heiskell, 119 U. S. 450.

[4] See e. g. King *v.* Penn, 43 Ohio St. 57; Burpee *v.* Sparhawk, 108 Mass. 111, 114. One does not become a party to a cause, so as to be bound by the judgment, by merely obtaining leave of court to be made a party. Denny *v.* Bennett, 128 U. S. 429. But any one interested in a cause may in equity be made a party thereto against his will, so as to be bound by the decree rendered. There has been some doubt whether this rule applies to the case of a bill to foreclose a mortgage, so that the plaintiff can make a prior incumbrancer, or one holding a paramount title not prior, such as a tax title, a party to be bound by the decree, but the better opinion is that he can. Hefner *v.* New York Life Ins. Co., 123 U. S. 463, where the conflicting decisions and dicta are reviewed. 'To a bill in equity,' said Mr. Justice Gray in that case, 'to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is due and payable, he may, and when the property is ordered to be sold free of all incumbrances, must be, made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the

should be noticed too that purchasers pendente lite of non-negotiable [1] property in litigation are, so far as the property is concerned, deemed to stand in the situation of parties.[2] But parties, it is said, must be openly such; there can be no secret parties in benefit, unknown to the adverse side.[3]

The recent case of Wright *v.* Phillips [4] may be referred to as a forcible illustration of the rule that personal judgments cannot affect the rights of strangers. It was there held that, notwithstanding a judgment rendered in favor of one of several distributees of an estate of a decedent against the administrator, the other distributees, not parties to the action, might show that the distributee in the first suit had by the judgment obtained more than his proper share of the estate.

In Petrie *v.* Nuttall [5] the plaintiff sued in trespass for breaking and entering the plaintiff's land. The defence was that the part referred to was a public highway; and an indictment, verdict, and judgment against the plaintiff were pleaded by way of estoppel for obstructing the very same piece of land, as being the queen's highway. To this defence the plaintiff demurred; and his demurrer was sustained on the ground that the parties were not the same in the two actions.[6]

The point decided in Petrie *v.* Nuttall is well settled. Judgments in criminal causes are rendered between the state and

first mortgage.' For this various cases are cited.

[1] Orleans *v.* Platt, 99 U. S. 676.

[2] Stout *v.* Lye, 103 U. S. 66; Eyster *v.* Gaff, 91 U. S. 521; Daniels *v.* Henderson, 49 Cal. 243.

[3] Schroeder *v.* Lahrman, 26 Minn. 87, where it was held that secretly employing counsel and appearing as a witness were not enough to enable one to make use of the judgment as an estoppel.

[4] 56 Ala. 69.

[5] 11 Ex. 569.

[6] Alderson, B. said that it was essential to an estoppel that it should be mutual, so that the same parties or privies might be bound and take advantage of it. The crown and subject were parties to the indictment; and therefore it was not between the two parties to this action. 'The distinction,' he said, 'is shown by the authority cited in Viner's Abr., Estoppel (F), 35, where it is said: "If a man indicted of extortion or trespass puts himself into the grace of the king, and makes fine, and, after, the party sues against him thereof by bill or writ, and he pleads not guilty, he shall have the plea, and the making of fine to the king shall not estop him." That is precisely this case, and we ought to follow the same rule. No doubt the judgment in the indictment may be given in evidence upon the trial of the issue as to whether the locus in quo is a public highway; but it cannot be pleaded as an estoppel.'

the defendant; they are not binding in civil cases, though the defendant or the state be there a party, either for or against such party, for want of mutuality.[1] Hence an acquittal upon a charge of crime will not estop one who accuses the party acquitted from proving the charge true in an action for slander.[2]

In a case in Massachusetts[3] the defendant contracted to sell land to the plaintiff, but instead of doing this sold the land to a third person. The action was for the breach of contract; and the defendant produced in bar the record of a suit in chancery by the plaintiff against him and the party to whom he conveyed the land for a specific performance of the contract and for relief; alleging that the whole subject-matter of the contract and the breach was investigated, and the suit dismissed. But the court said that this was no bar, the suit in equity being between other parties.

There is conflict of authority concerning the effect of judgment against parties under legal disability who failed to plead the defence of incapacity. In Griffith *v.* Clarke[4] judgment by default had been obtained against a married woman in a suit upon a promissory note; and an injunction having been obtained to restrain the former plaintiff from obtaining satisfaction of the judgment, the court refused to dismiss it. The feme, it was said, was not competent to employ counsel; and the contract sued upon being void, she was not to be prejudiced by the entry of judgment by default against her for non-appearance.

In Morse *v.* Toppan,[5] which was an action of contract on a judgment against a married woman obtained on a contract made by her, the court held that the coverture of the defendant at the time of the previous action was a bar to the present suit. The case, it was said, was the same as if she had entered into an obligation by bond at the same time, to which she might have pleaded non est factum. 'A judgment,' said the court, 'is in the nature of a contract; it is a specialty, and creates a debt;

[1] Castrique *v.* Imrie, L. R. 4 H. L. 414, 434; Corbley *v.* Wilson, 71 Ill. 209. See McBee *v.* Fulton, 47 Md. 403, and comp. Duchess of Kingston's Case; ante, p. 91.

[2] Corbley *v.* Wilson, 71 Ill. 209.

[3] Buttrick *v.* Holden, 8 Cush. 233.

[4] 18 Md. 457.

[5] 3 Gray, 411.

and to have that effect it must be taken against one capable of contracting a debt.'[1]

On the other hand, it has been decided in Indiana upon a long line of authorities in that state that judgment obtained against a married woman by default upon a contract void for coverture is binding; and the two cases above referred to were sharply criticised.[2] So it has been held in Pennsylvania that where a married woman had executed a mortgage in her maiden name, upon which a scire facias was executed against her in the same name, judgment recovered, and the land sold, the purchaser gets a good title, and the feme cannot allege her coverture in ejectment for the premises against him.[3] However, it has also been decided in Pennsylvania, upon the authority of several cases in that state, that judgment on scire facias issued on a judgment against a married woman on a bond by her and warrant to confess judgment is void, and that a sheriff's sale thereunder passes no title.[4] But the enabling acts concerning married women have made great changes in the law in reference to questions of this kind.

In regard to infants the statutes generally give a day upon their attaining majority in which they may have judgments or decrees previously rendered against them reversed or set aside; and if they do not avail themselves of this immunity, the result is that the judgments or decrees become binding upon them.[5] In cases not arising under this class of statutes there is a con-

[1] Faithorne *v.* Blaquire, 6 Maule & S. 73. For the later rule in Massachusetts see Freison *v.* Bates College, 128 Mass. 464. A married woman may now be bound by covenants of warranty in Massachusetts. Knight *v.* Thayer, 125 Mass. 25.

[2] Burk *v.* Hill, 55 Ind. 419. This is of course a qualification to the general rule that an illegal or void contract cannot be made the basis of an estoppel. Mattox *v.* Hightshue, 39 Ind. 95; Pettis *v.* Johnson, 56 Ind. 139.

In North and South Carolina also judgment is binding. Grantham *v.* Kennedy, 91 N. Car. 148; Crenshaw *v.* Julian, 26 S. Car. 283.

[3] Hartman *v.* Ogborn, 54 Penn. St. 120. See also Van Metre *v.* Wolf, 27 Iowa, 341; Green *v.* Branton, 1 Dev. Eq. 500; Gambetta *v.* Brock, 41 Cal. 78; Patterson *v.* Fraser, 5 La. An. 586; Elson *v.* O'Dowd, 40 Ind. 300; Guthrie *v.* Howard, 32 Iowa, 54.

[4] Graham *v.* Long, 65 Penn. St. 383; Dorrance *v.* Scott, 3 Whart. 309; Caldwell *v.* Walters, 18 Penn. St. 79. See also Baines *v.* Burbridge, 15 La. An. 628.

[5] Waring *v.* Reynolds, 3 B. Mon. 59; Porter *v.* Robinson, 3 A. K. Marsh. 253.

flict of authority like that above mentioned. An infant duly represented by guardian in an action will indeed be estopped by judgment against the latter.[1] And in Georgia, Kentucky, Indiana, North Carolina, and perhaps elsewhere, judgments against infants sued without guardian are held to be voidable only, and hence not impeachable in collateral actions.[2] In Illinois such judgments are held void.[3] And this appears to be the better doctrine, at least where the legislature has provided a special mode of action against infants. In such cases the proceeding is not according to the course of the common law, and hence by analogy to other cases the presumption concerning the court's jurisdiction cannot be conclusive if there be no express averment in the record.[4] Thus, if the record should simply state that the defendant was served with process, he could in the collateral suit allege, if not too late, that he was then an infant without guardian, and that no guardian ad litem was appointed.[5] Whether he could do so in case of an appearance and neglect to plead his disability is more doubtful; although if the view above expressed be accurate, that the judgment is a contract, it could not be material whether there had been an appearance or not; in either case the judgment could be impeached. But it is doubtful if a judgment for the plaintiff can be considered for all purposes a contract. Perhaps the more consistent rule would be that judgment against an infant without guardian or appearance is not binding in collateral actions, but if an appearance were entered, that the judgment cannot be disturbed.[6] This subject, however, is largely matter of statutory regulation, and will not be further pursued.

[1] Sharp *v.* Findley, 71 Ga. 654, 667; Bailey *v.* Bailey, 115 Ill. 551.

[2] Ibid.; Evans *v.* Collier, 79 Ga. 319, 322; Blake *v.* Douglass, 27 Ind. 416; Marshall *v.* Fisher, 1 Jones, 111. See also Grantham *v.* Kennedy, 91 N. Car. 148; Austin *v.* Charlestown Female Sem., 8 Met. 196; Ralston *v.* Lahee, 8 Iowa, 11. The statements of the court in the latter case are only dicta. The proceeding was not collateral, but direct.

[3] Whitney *v.* Porter, 23 Ill. 445.

[4] See post, § 4.

[5] See Whitney *v.* Porter, supra. But see Austin *v.* Charlestown Female Sem., 8 Met. 196; Rutter *v.* Puckhover, 9 Bosw. 638, to the effect that even then the judgment would be only voidable and not void..

[6] Judgment against an adult in an action by him against an infant is of course conclusive upon him. Kendall *v.* Titus, 9 Heisk. 727. The defence of disability is personal to the one subject to it. Comp. First National Bank *v.* Gillilan, 72 Mo. 77.

Apart from statutory enactment, judgment against a lunatic, in a suit duly begun, is binding in collateral actions;[1] and the same is true of judgment against a person deceased.[2] But the party or estate to be affected must be properly represented, otherwise judgment would be entirely void.

There is a class of cases, resting upon a different ground from that of merger, in which also it is no valid objection to the plea of res judicata that the parties to the former action were more or less[3] numerous than in the present suit. Chief among these are cases in which real parties fight out a cause behind a nominal party.[4] In Tate *v.* Hunter[5] it appeared that the complainant's testator had brought an action of assumpsit against a sheriff for a sum of money collected by him under process of a court of law and retained to be applied to an execution which had been assigned to the defendant. After a revivor by the complainants as executors, and a closely contested litigation, judgment had gone for the defendant. The complainants then filed the present bill, praying that the execution and judgment in question (the one assigned to the defendant) might be postponed to the subsequent judgment in favor of their testator against the party whose funds the sheriff had collected and retained. But the bill was dismissed. Mr. Chancellor Dargan said that the only question to be considered was whether the present suit was between the same parties as were before the court in the prior suit against the sheriff; and he was of opinion

[1] Wood *v.* Bayard, 63 Penn. St. 320; Foster *v.* Jones, 23 Ga. 168; Lamprey *v.* Nudd, 29 N. H. 299; Clarke *v.* Dunham, 4 Denio, 262.

[2] Carr *v.* Townsend, 63 Penn. St. 202; Stortzell *v.* Fullerton, 44 Ill. 108; Reid *v.* Holmes, 127 Mass. 326; Spalding *v.* Wathen, 7 Bush, 659; Coleman *v.* McAnulty, 15 Mo. 173.

[3] Follansbee *v.* Walker, 74 Penn. St. 306; Davidson *v.* State, 63 Ala. 432.

[4] Tate *v.* Hunter, 3 Strob. Eq. 136; Lyon *v.* Stanford, 42 N. J. Eq. 411; Castle *v.* Noyes, 14 N. Y. 329. Comp. cases of representative parties, pp. 120–127, 136. And see Verplanck *v.* Van Buren, 76 N. Y. 247, 256; Thames *v.* Jones, 97 N. Car. 121, numerous parties suing or defending through one. 'True, the parties plaintiff in the two actions differ in name of person, but their representative character is the same in that each stands for the estate and right of T W C. True, they were appointed at the instance of different creditors; but one succeeded the other in title, and took into possession the same estate and right, that of T W C.' Folger, J. in Verplanck *v.* Van Buren.

[5] 3 Strob. Eq. 136.

that they were the same. The sheriff in the former action was only a nominal party; the defendant in the present case being the real party in interest. The sheriff was simply a stakeholder without a particle of interest; it mattered not to him which of the claimants recovered the money in his hands. The battle was fought over his shoulders by the real parties. The defendant was not only the real party adverse in interest to the complainants, but he had notice of the suit and defended it by counsel.

A more difficult question arises from the relation of principal and agent or of master and servant. What is the effect of judgment obtained against an agent or a servant, whose act is the act of the principal or master, when the superior has not been made a party to the suit? Clearly, if the principal or master has not participated in a tort committed by the agent or servant, the two cannot strictly be joint or several tortfeasors. If there has been participation, joint or several judgments can in this country, as we have seen, be obtained; and perhaps, without participation, a *joint* judgment against the two together might be obtained, based upon the act of the servant or agent alone, where that act binds the master or principal.[1] But can several judgments be had in such a case? Will the mere fact alone that A is liable for the act of B, be sufficient ground for an action and judgment against each separately? Now, if an action cannot be maintained against a master after judgment against his servant for the authorized act of the latter, it must be because the master is bound by the judgment just as if he had been a defendant with his servant, or because of merger of the cause of action, or because of election. But the first of the reasons cannot hold good; for it would always be open to a plaintiff, by collusion with a servant at variance with his master, to subject the latter's property to execution. The second reason has a better foundation. There is no several liability because there has been no several tort by each; the master has in no way participated in the wrong committed by his servant. The one action must therefore in principle include the whole cause of action; and the one judgment must merge the one cause of ac-

[1] But see Campbell *v.* Phelps, 1 Pick. 62; infra, p. 122.

tion, annulling it by transforming it into a judgment obligation.[1] The case may also well stand upon the footing of election; probably that is the better footing.[2]

The question, as it has been presented before the courts, has generally arisen in relation to officer and deputy; though it has sometimes taken the wider form in which we have thus far considered it, the result generally being in accord with the view above taken.[3] In Priestly *v.* Fernie the plaintiff sued the owner of a ship on a bill of lading, and the defendant pleaded a judgment on the same bill of lading against the master of the vessel, obtained by the same plaintiff. The question was finally raised by demurrer whether the judgment pleaded was a bar to the present action. It was held that it was, on the ground of election.[4]

[1] No action can be maintained against the sheriff upon a judgment against the deputy; the sheriff does not owe the judgment, not having been a party to the cause. Pervear *v.* Kimball, 8 Allen, 199.

[2] See Priestly *v.* Fernie, 3 Hurl. & C. 977; Kingsley *v.* Davis, 104 Mass. 178; King *v.* Chase, 15 N. H. 9.

[3] Priestly *v.* Fernie, 3 Hurl. & C. 977; Warfield *v.* Davis, 14 B. Mon. 40; Lyon *v.* Stanford, 42 N. J. Eq. 411, 414; Emery *v.* Fowler, 39 Maine, 326. But see Maple *v.* Railroad Co., 40 Ohio St. 313. This doctrine was stretched too far in Hill *v.* Bain, 15 R. I. 75. See also Atkinson *v.* White, 60 Maine, 396.

[4] Mr. Baron Bramwell said: 'We are of opinion our judgment should be for the defendant. If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made, the contractee has an *election* to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is the case here. . . . If this then were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners, and their liability where he acts for them, is different from the liabilities in ordinary cases of principal and agent, and that first one and then the other may be sued. The plaintiff's argument then, namely, that the present case is anomalous, is exceptional. When that is contended for, strong reason ought to be given for it. What is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, namely, he makes the contract in his own name. Rich *v.* Coe, 2 Cowp. 636; Story, Agency, § 296. But it is said that for purposes of commerce it is convenient both master and owner should be suable. So it is, but why to the extent contended for more than in any other case

In the narrower form the question arose in Campbell *v.* Phelps.[1] The action in that case was trespass de bonis asportatis against the sheriff of Hampshire; to which the defence was that the taking complained of was by the defendant's deputy-sheriff, and that the plaintiff had obtained judgment for it against the deputy. The plaintiff replied that the judgment had not been satisfied; to which there was a demurrer, which the Supreme Court sustained. It was held by a majority of the court that the sheriff and his deputy were not to be considered as joint (or several) trespassers on their mere relation to each other so as to subject them to a joint action,[2] or to give the party injured a right to bring his action against one after obtaining judgment against the other.[3] The opposite view has been taken by the Supreme Court of Connecticut.[4]

But if upon judgment in favor of the plaintiff against the servant another action cannot be permitted for any reason, what shall be said of the effect of judgment for the defendant in the first suit? Merger being out of the question in such a case, must the plaintiff be permitted, if he desires, to sue the master? It should seem not, for the question of defendants is immaterial to him; the only question is whether the servant committed the

of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; but why, if he sues the master, should he afterwards sue the owner merely because it is very right he should be able to sue the captain or owner? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent. It is not said none could be given why in all cases of principal and agent both should be suable, but that there is no particular reason applicable to the masters and captains of ships.' The learned baron then says that the only authority for the position of the plaintiff is a passage in one of the works of Mr. Justice Story (Story, Agency, § 295), given on the authority of Mr. Livermore (2 Livermore, Agency, 267). He shows that the former misunderstands the latter; and that though the case cited of Rich *v.* Coe, 2 Cowp. 636, which he pronounces of questionable authority, supports the proposition stated by Mr. Livermore, it does not support that maintained in Story on Agency.

[1] 1 Pick. 62.

[2] This appears to be a purely technical position. The deputy must be liable because the tort is his; and the deputy's act binds the sheriff in the situation under consideration. There is no reason, except the technical one, why both may not be sued together.

[3] See further Todd *v.* Old Colony R. Co., 3 Allen, 18; Pervear *v.* Kimball, 8 Allen, 199; Bennett *v.* Hood, 1 Allen, 47; Elliott *v.* Hayden, 104 Mass. 180.

[4] Morgan *v.* Chester, 4 Conn. 387. Comp. Warner *v.* Comstock, 55 Mich. 615.

illegal act sued for, and this may as well be decided once for all in an action against either the servant or the master. Nobody's rights can be affected by allowing the master to produce the record of the judgment as conclusive evidence against the plaintiff's demand. It is not the case of a stranger availing himself of the benefit of a record inter alios; and so it has been decided in New Hampshire,[1] and in effect in Maine.[2]

This view, however, is based upon the assumption that the judgment in favor of the defendant proceeded upon a ground equally applicable in an action against the master; such, for example, as the lawfulness or unlawfulness of the act in question. Thus, in an action of assumpsit[3] for rent against the assignees in bankruptcy of one Evans, it appeared that in a former action of replevin by the assignees against the present plaintiff's bailiff for cattle distrained for rent of the same premises, the question arose whether there was a tenancy between the assignees and the plaintiff. The issue was found against the assignees, and the plaintiff now relied upon the judgment in that case to prove the tenancy; the former judgment having determined that they were tenants at a time subsequent to that now alleged. The defendants contended that the record was not evidence against them, as the parties in the replevin suit were different from those in the present; the defendant in that action being the bailiff. But Lord Ellenborough held the judgment binding upon them.

Similar principles ought to prevail in questions of principal and surety. While the question of a right of action against either after judgment *against* the other will depend upon the further question whether the engagement sued upon is joint or several,[4] it seems clear that judgment in *favor* of the principal

[1] King *v.* Chase, 15 N. H. 9, 19. The ground taken was the equally true one that the plaintiff, having an election, had elected to sue the deputy.

[2] Emery *v.* Fowler, 39 Maine, 326. But see Maple *v.* Railroad Co., 40 Ohio St. 313.

[3] Hancock *v.* Welch, 1 Stark. 347.

[4] Judgment against a party without fraud or collusion will be binding not only upon him but upon a surety with him in a subsequent recognizance, or a bond to dissolve an attachment conditioned to pay the judgment. Way *v.* Lewis, 115 Mass. 26; Cutter *v.* Evans, ib. 27. So principal or surety may have the benefit of a judgment against both in a subsequent contest with the opposite party involving the same question. See Ehle *v.* Bingham, 7 Barb. 494; infra, p. 127.

or the surety, in a suit against either, upon a ground applicable to both, should (so far) be accepted as having conclusively decided against the plaintiff's right of action.[1] The matter of newly discovered evidence, if such should be urged, should be disposed of (in this and the case above considered) as upon a motion for a new trial; but no new action should be permitted upon the same evidence by simply changing the name of the defendant.

In a case of principal and agent, where the agent, having made a contract in his own name, has been sued thereon and judgment rendered against him, it is in like manner laid down that no action can be maintained against the principal.[2] The rule is no doubt different in the case of an undisclosed agency; but if a case be carried to judgment against the agent after knowledge of all the facts has reached the plaintiff, he will not be permitted to sue the principal.[3] And on the other hand, if judgment has gone in favor of the defendant upon a ground affecting the very validity of the contract, this ought also to be conclusive in a subsequent action against the principal. It should be stated, however, that the effect here noticed of an action and judgment against the agent is by the authorities based upon the ground of election;[4] and in a recent case it has been said that this election does not become binding until satisfaction, which is of course as much as to say that there is no binding election at all in such cases.[5] But this, it is apprehended, is not the better doctrine. When the cause has once reached judgment, the demand ought to be treated as determined,[6] unless matters exist which would justify a new trial, in which case there may be no sound objection to permitting the plaintiff to bring his action against the party not sued in the first proceeding. It may be added in this connection that judgment against

[1] State *v.* Coste, 36 Mo. 437.

[2] Priestly *v.* Fernie, 3 Hurl. & C. 977.

[3] Kingsley *v.* Davis, 104 Mass. 178; Raymond *v.* Crown Mills, 2 Met. 319; Jones *v.* Ætna Ins. Co., 14 Conn. 501.

[4] Priestly *v.* Fernie, p. 121, note 4.

[5] Beymer *v.* Bonsall, 79 Penn. St. 298.

[6] As for the subsequent discovery of an undisclosed principal a new action could consistently with this position be allowed, since the plaintiff, not knowing of the existence of a principal, had not *elected* to sue him.

the agent upon a cause of action for which the principal is liable is probably conclusive upon the principal in the absence of fraud or collusion on the part of the agent.[1]

We have thus far spoken of the effect of a judgment for or against the servant or agent in a subsequent action against the master. Sometimes the converse situation is brought before the courts, and a question presented of the effect of a judgment for or against the master in a subsequent action against the servant. But the same principles should prevail, and indeed have been held to prevail. In Calkins *v.* Allerton[2] the plaintiff brought trover for cattle. The defendant justified the taking as having been done under the orders of a third person and under his title. Thereupon the plaintiff, to prove his own title and right of possession, produced the record of a judgment in his favor in an action of trover brought by him against the person under whom the defendant now justified. The defendant objected on the ground that the parties to that suit were different from those to the present; but the record was received and held conclusive. The court thought, indeed, that if the present defendant had sustained the relation of co-trespasser with the defendant in the former action, the record would be inadmissible; but it was considered that the defendant could not be so treated. It may be doubted if in this the court were not in error. It was by defendant's voluntary act that the conversion was effected, and the mere fact that the master would be bound to indemnify him for the consequences would not prevent the defendant being a co-trespasser. However, this would not militate against the ruling of the court, because the defendant claimed no title to the cattle in himself. As the court well proceeded to say, the defendant justified under the master, alleging title in *him;* on this ground the judgment was conclusive concerning the title to the cattle. The court called the situation one of privity, but (it seems) it was not a case of privity in the ordinary sense of the law of estoppel; there was no succession of interests. The better ground for the decision would be that the judgment had decided a question in which the defendant, by his own admission,

[1] See Lyman *v.* Faris, 53 Iowa, 498; Clark *v.* Wolf, 29 Iowa, 197.
[2] 4 Barb. 171.

had no interest. If, on the other hand, as we have already intimated, the defendant had claimed title to the property, the record, it is clear, would have been inadmissible. Thus, in another action of trover, in answer to which the defendant relied upon the record of a judgment in his favor in a replevin suit by him against the plaintiff's servant for the same property, the record was held inadmissible.[1] It should be added that a sheriff is not the agent or servant of the owner of property attached and sold by him. The result is that judgment against the sheriff for a wrongful attachment of the plaintiff's goods is without avail against a purchaser at the officer's sale; the purchaser deriving his title from the owner, not from the sheriff.[2]

If in cases of principal and agent or of bailment the principal or bailor bring an action and proceed to judgment on the merits, the agent or bailee cannot sue for the same demand even though he could have done so originally in his own name.[3] In the case first cited it appeared that the owners of a cargo of salt had brought suit against certain carriers (who had agreed to forward it) for negligence in failing to deliver it at the place agreed, with a count in trover for a conversion of the salt. Judgment had gone for the defendant. Subsequently in the present case the bailee of the owners brought an action based on the same grounds; but the court held the former judgment a bar. The court said that as a general rule a bailee (by reason of having a special property) and the general owner might either of them sustain an action for the conversion of or an injury to property in which they were interested. The right to sue was indispensable to enable each to protect his particular interest; but as the law would not suffer a defendant to be twice harassed for the same cause, only one suit could be brought, and it would be a bar to every other.

On the other hand, judgment obtained by or against the agent or bailee cannot be used for or against the principal or bailor, except in case of an action brought at his instance,[4] or by due

[1] Alexander *v.* Taylor, 4 Denio, 302.

[2] McKay *v.* Kilburn, 42 Mich. 614. And comp. Hunt *v.* Haven, 52 N. H. 162, which turned upon a like principle.

[3] Green *v.* Clarke, 12 N. Y. 343; Kent *v.* Hudson River R. Co., 22 Barb. 278.

[4] One who instigates and promotes a

authority,[1] or when he has received and retained the fruits of the judgment. Thus, in the case of Pico *v.* Webster[2] an action had been brought by an agent, in his own name, for a trespass in taking gold coin from the possession of the agent, and converting it; in which action the jury had found that the coin belonged to the principal, and had given nominal damages. The principal now sued the same defendant for the same trespass; and the former judgment was relied upon as a bar. But the court overruled the objection. 'There was,' it said, 'no evidence, certainly no conclusive proof, that the suit of Brodie [the agent] was brought at the instance or for the use of Pico.'

Other cases than these (not of privity in the sense of the law of estoppel) have also arisen in which a former judgment has been held a bar though the parties were not precisely the same in that cause as in the one to which it is invoked as a bar;[3] as where judgment is rendered against B and C in a suit by A, and the same question is raised again in a suit by B against A. Ehle *v.* Bingham was such a case. The action was brought to recover damages for breach of warranty in the sale of sheep. The plaintiff had given his note for them, in which another had joined with him as surety; and the sheep having proved to be diseased he sued on the warranty of soundness. The defendant gave in evidence the record of an action by himself in which he obtained judgment upon the note against the plaintiff *and his surety;* the latter not being a party to the present action. It appeared from the record that the plaintiff had then set up in defence the subject-matter of the present suit. The plaintiff objected to this judgment as res inter alios acta; but the objection was overruled.[4]

suit for one's own benefit, by employing counsel and binding oneself to the payment of costs and damages, is bound by the judgment obtained. Landis *v.* Hamilton, 77 Mo. 554, citing Stoddard *v.* Thompson, 31 Iowa, 80; Lovejoy *v.* Murray, 3 Wall. 1, 18. Comp. ante, p. 115, note 3.

[1] Nemetty *v.* Naylor, 100 N. Y. 562.

[2] 12 Cal. 140.

[3] Ehle *v.* Bingham, 7 Barb. 494; Whitford *v.* Crooks, 54 Mich. 261; Follansbee *v.* Walker, 74 Penn. St. 306; Davidson *v.* State, 63 Ala. 432; Parnell *v.* Hahn, 61 Cal. 131; Nemetty *v.* Naylor, 100 N. Y. 562 (that one of a partnership may represent the firm, in litigation).

[4] Upon this point Mr. Justice Edwards said: 'It will be remembered

The case of Thompson *v.* Roberts[1] is another example of a different kind. Mr. Justice Grier, speaking for the court upon the question of res judicata, said that the objection that the parties were not the same in both suits could not be sustained. Both parties to this litigation were parties to that suit; the subject-matter was the same; the defence now set up was the same which the pleadings and the evidence show to have been adjudicated in the Court of Chancery. It was true that by reason of interest S was joined as complainant, and a certain company were made respondents, according to the practice in the Courts of Chancery, where all parties having an interest in the question to be tried are made parties that the decree may be final upon all matters in litigation. No good reason could be given why the parties in this case, who had litigated the same question, should not be concluded by the decree because others having an interest in the question or subject-matter were admitted by the practice of a Court of Chancery to assist on both sides.[2]

The question of the conclusiveness of a former judgment in ejectment in a subsequent action of the same kind came before the Supreme Court of the United States in the case of Miles *v* Caldwell.[3] The complainant sought to evade the force of the defence on the ground that the verdict and judgment in ejectment had not that conclusive effect which they had in other proceedings. But the court, conceding that the point would be well taken with regard to the common-law action of ejectment

that the former suit was upon a promissory note which grew out of a transaction to which the plaintiff and defendant in this suit alone were parties, and that the plaintiff in this suit put in a separate plea and notice of a matter personal to himself; and the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment.'

[1] 24 How. 233.

[2] Western M. Co. *v.* Virginia Coal Co., 10 W. Va. 250, 293. 'It mattered not,' said the court in this case, 'that other parties were plaintiffs and defendants,' such parties being joined as successors to the present plaintiffs and defendants. 'The matters at issue common to both suits have been adjudicated.' And Thompson *v.* Roberts was then quoted. See also Pollard *v.* Railroad Co., 101 U. S. 223 (that judgment in assumpsit by husband and wife in favor of the plaintiffs for injury caused the wife by a carrier of passengers bars an action by the husband alone for damages from the same cause of action); Lawrence *v.* Hunt, 10 Wend. 80.

[3] 2 Wall. 35.

with its fictitious parties,[1] held otherwise.[2] This is clearly the sensible view; but no uniform rule prevails upon the subject, ejectment having been variously treated according to the nature of statutory provisions or the persuasive force of the old common-law rule.[3]

[1] See Doe *v.* Harlow, 12 Ad. & E. 40; Doe *v.* Thomas, 1 Tyrwh. 410; Bailey *v.* Fairplay, 6 Binn. 450; Rogers *v.* Haines, 3 Greenl. 362; Richardson *v.* Stewart, 2 Serg. & R. 84; White *v.* Kyle, 1 Serg. & R. 515; Calhoun *v.* Dunning, 4 Dall. 120; Cherry *v.* Robinson, 1 Yeates, 525; Eldridge *v.* Hill, 2 Johns. Ch. 281; Doe *v.* Huddart, 2 Cromp. M. & R. 316; Jones *v.* De Graffenreid, 60 Ala. 145; Shaw *v.* Lindsey, ib. 344. In Pennsylvania two verdicts the same way become a bar to a third suit; but if there be verdict against verdict, another action may be brought, and judgment thereon will be conclusive. Gibson *v.* Lyon, 115 U. S. 439, 446; Britton *v.* Thornton, 112 U. S. 526.

[2] Mr. Justice Miller, in delivering judgment, said: 'It must be conceded that such is the general doctrine on the subject as applicable to cases tried under the common-law form of the action of ejectment. One reason why the verdict cannot be made conclusive in those cases is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A B, who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A B cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor; for there is no privity between John Doe and John Den. Hence technically an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used. It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in ejectment that induced courts of equity (which, unrestrained by the technicality, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place, to determine fairly the validity of the title, and by injunction directed to the unsuccessful litigant compel him to cease from harassing his opponent by useless litigation. There was perhaps another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors that they were not willing that the claim to it should, like all other claims, be settled forever by one trial in any ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title. They, however, did concede to those solemn actions, the writ of right and the writ of assize, the same force as estoppels which they did to personal actions in other cases.'

[3] See Boyle *v.* Wallace, 81 Ala. 352, 355; Cagger *v.* Lansing, 64 N. Y. 417; Dawley *v.* Brown, 79 N. Y. 390; Doyle *v.* Hallam, 21 Minn. 515; Sturdy *v.* Jackaway, 4 Wall. 174; Barrows *v.* Kindred, ib. 399; Stephenson *v.* Wilson, 50 Wis. 95; Wilson *v.* Henry, 40 Wis. 594; Phillpots *v.* Blasdell, 10 Nev. 19; Marshall *v.* Shafter, 32 Cal. 176; Amesti *v.* Castro, 49 Cal. 325; Kimmel *v.* Benna, 70 Mo. 52; Brownsville *v.* Cavazos, 100 U. S. 138; Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Penn. St. 173; Gordinier's Appeal, 89 Penn. St. 528; McLaughlin *v.* McGee,

Cases have arisen where the former judgment invoked as a bar was rendered in an action in which the parties were nominally the same though the real parties were different. In such cases the judgment has been held no bar.[1] The case cited was an action in the name of the president of the Orphans' Court for the use of Eshelman and his wife, to recover a distributive share of the estate of the wife's father. To this suit the defendant pleaded in bar a former judgment against himself for the same matter, recovered in the name of the then sitting president of the Orphans' Court, for the use of one Herr, trustee of Eshelman the present plaintiff. In the court below the plea was held good; but on appeal judgment was reversed. Chief Justice Gibson said that it was true the former suit, like the present, was brought nominally by the president of the Orphans' Court; but it was really for the use of Eshelman's assignees. He said that it was only by virtue of the maxim 'communis error facit jus' that the president of the Orphans' Court could sue at all in such a case; but though it would be mischievous now to doubt the validity of such an action, it would be as much so to let it stand in the way of substantial justice for the sake of technical congruity.

It is laid down in Alabama that a judgment rendered by a judicial tribunal authorized to try contested elections is conclusive in a subsequent quo warranto by the state on the relation of the defeated contestant.[2] But such a judgment clearly would not bar a subsequent inquiry into the facts by the state unless the first tribunal, like a state legislature or Congress, had exclusive jurisdiction.[3] So it is held that a man who is not a party to a judgment in which he is interested, but from which he joins in appealing, is not estopped in another action by the judgment appealed from.[4]

Judgments as a general rule conclude the parties only in the

79 Penn. St. 217. The consent rule in ejectment creates no estoppel. Day *v.* Case, 78 Ga. 58.

[1] Eshelman *v.* Shuman, 13 Penn. St. 561.

[2] Davidson *v.* State, 63 Ala. 432; Moulton *v.* Reid, 54 Ala. 320. See People *v.* Hall, 80 N. Y. 117. See, however, Lee *v.* State, 49 Ala. 44.

[3] People *v.* Hall, 80 N. Y. 117; People *v.* Murray, 73 N. Y. 535. See State *v.* Hardie, 1 Ind. 42.

[4] Majors *v.* Cowell, 51 Cal. 478.

character in which they sue or are sued ;[1] and therefore a judgment for or against an executor, administrator, assignee, trustee, agent, or attorney, as such, presumptively does not preclude him, in a different cause of action affecting his own proper person, from disputing the special findings in the former cause.[2] And so appearing in an action as heir of A will not estop the party to claim the same property as devisee of A's widow,[3] or as a creditor having a lien.[4]

There are some apparent but perhaps no real exceptions to this rule. Thus, as we have already seen, a judgment by default of plea against an administrator is a conclusive admission against him personally in an action by the creditor for a devastavit.[5] This, however, is only an apparent exception. The former judgment in this case affects the administrator personally, since it is a conclusive admission that he has in hand assets of the deceased unadministered at the time.[6] So judgment in regard to title against a trustee as representing the cestui que trust will preclude him from claiming in the latter capacity adversely to the decision.[7]

Under certain circumstances interested persons are held bound by judgments when they were not in point of fact parties to the proceedings, by giving them due notice of the suit. This occurs, for example, where the party notified is liable over to the notifying party to make good any recovery by the plaintiff; the notified party having opportunity as well as notice to appear.[8] In such

[1] Leggett *v.* Great Northern Ry. Co., 1 Q. B. D. 599 ; Lord *v.* Wilcox, 99 Ind. 491, 496 ; Lantz *v.* Maffett, 102 Ind. 23, 27 ; Elliott *v.* Frakes, 71 Ind. 412 ; Unfried *v.* Huberer, 63 Ind. 67 ; Cronan *v.* Frizell, 42 Ill. 319 ; Mansfield *v.* Hoagland, 46 Ill. 359 ; Stoops *v.* Woods, 45 Cal. 439 ; Rathbone *v.* Hooney, 58 N. Y. 463. So of other estoppels also. Jones *v.* Long, 50 Ala. 493 (in pais).

[2] Coke, Litt. 128 a ; Robinson's Case, 5 Coke, 32 b ; Middleton's Case, ib. 28 b ; Legge *v.* Edmonds, 25 L. J. Ch. 125 ; Fenwick *v.* Thornton, Moody & M. 51 ; Parker *v.* Moore, 59 N. H. 454. See Smith *v.* Morgan, 2 Moody & R. 257, explained in Metters *v.* Brown, 1 Hurl. & C. 686, 691 ; post, p. 135.

[3] Elliott *v.* Frakes, 71 Ind. 412. See Lantz *v.* Maffett, 102 Ind. 23, 26.

[4] Lord *v.* Wilcox, 99 Ind. 491.

[5] Leonard *v.* Simpson, 2 Bing. N. C. 176 ; Rock *v.* Leighton, 1 Salk. 310 ; ante, p. 78.

[6] Ibid.

[7] Corcoran *v.* Chesapeake Canal Co., 94 U. S. 741.

[8] Saveland *v.* Green, 36 Wis. 612, 622 ; Valentine *v.* Mahoney, 37 Cal. 389 ; Russell *v.* Mallon, 38 Cal. 259 ; Altschul *v.* Polack, 55 Cal. 633 ; Douglas *v.* Fulda, 45 Cal. 592 ; Carr *v.* United States, 98 U. S. 433 ; Morgan

a case judgment against the defendant becomes conclusive evidence in an action by him against the person liable over to him. In Love *v.* Gibson [1] the plaintiff sued the defendant for contribution as co-surety in a bond. It appeared that the obligees had sued the plaintiff alone on the bond; and that he thereupon gave notice to the present defendant, his co-surety, of the pendency of the suit. The defendant denied his liability upon the bond, contending that as he was not a party to the former suit, the judgment did not bind him. But the court held him estopped.[2] So, if a landlord defends for and in the name of his tenant, and puts his title in issue in aid of his tenant's right of possession, judgment against the tenant will bar any subsequent action by the landlord against the party recovering the judgment; the landlord's title has been adjudicated.[3]

The rule concerning the effect of notice to third persons to appear and defend suits the result of which may affect them is,

v. Muldoon, 82 Ind. 347, 352; Brown *v.* Taylor, 13 Vt. 631. But the government cannot be estopped by notice from its tenants or agents to defend proceedings against them. Carr *v.* United States.

[1] 2 Fla. 598.

[2] The court referred with approbation to the language of Mr. Justice Buller in Duffield *v.* Scott, 3 T. R. 374, where it was said: 'The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money.' Several other leading authorities were also cited, showing that the doctrine was well settled. See Smith *v.* Crompton, 3 Barn. & Ad. 407; Kip *v.* Brigham, 6 Johns. 158; Swartwout *v.* Payne, 19 Johns. 294; People *v.* Judges of Monroe Co., 1 Wend. 19; Clark *v.* Carrington, 7 Cranch, 308, adding the qualification that the judgment must have been fairly and honestly obtained. See also Milford *v.* Holbrook, 9 Allen, 17; Annett *v.* Terry, 35 N. Y. 256; Thomas *v.* Hubbell, 15 N. Y. 405; s. c. 35 N. Y. 120; Chicago *v.* Robbins, 2 Black, 418; Huzzard *v.* Nagle, 40 Penn. St. 178; Carlton *v.* Davis, 8 Allen, 94; Tracy *v.* Goodwin, 5 Allen, 409; State *v.* Roswell, 14 Ohio St. 73; Lipscomb *v.* Postell, 38 Miss. 476; Lyon *v.* Northrup, 17 Iowa, 314; McNamee *v.* Moorland, 26 Iowa, 96; Dane *v.* Gilmore, 51 Maine, 544; Brown *v.* Bradford, 30 Ga. 927; Knapp *v.* Marlboro, 34 Vt. 235. The court then stated the rule as follows: 'If the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defences he might otherwise have to the introduction of the instrument to be introduced in evidence; and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed res judicata.' Love *v.* Gibson, 2 Fla. 598.

[3] Valentine *v.* Mahoney, 37 Cal. 389; Russell *v.* Mallon, 38 Cal. 259; Altschul *v.* Polack, 55 Cal. 633.

indeed, somewhat wider than these special examples might indicate; its full extent is thus set forth by Mr. Justice Bell in Littleton *v.* Richardson:[1] When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means of controverting the claim as if he were the real and nominal party upon the record. In every such case if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not, for he is bound to take up the cause at that point, in exoneration of the defendant; the latter need not longer defend.[2] That was the case of a party who had placed obstructions in a highway; who, being answerable to the town, was held bound by judgment in favor of a traveller against the town, which had given him notice of the suit.

The rule in this case is referred to with approval in Boston *v.* Worthington[3] and in Chamberlain *v.* Preble.[4] In the latter case the plaintiff sued upon a breach of warranty in a conveyance of real estate in fee simple, the breach being that one Comer had recovered judgment against the plaintiff as tenant by the curtesy of the premises. In support of his action, and to show paramount title in Comer in the land conveyed with warranty by the defendant to one Baldwin under whom the plaintiff claimed by warranty deed, he produced the judgment mentioned, recovered by Comer in a writ of entry. It appeared that when that suit was brought, the present plaintiff notified Baldwin, who assumed the defence, employed counsel, and notified the present defendant, Preble (Baldwin's grantor), of the pendency of the action, and requested him to assume the defence. It did not appear that Preble took any part in the defence. The judgment was treated as conclusive upon him, though entered upon an agreed statement of facts, and though there was an erroneous

[1] 34 N. H. 179, 187.

[2] Morgan *v.* Muldoon, 82 Ind. 347; Jackson *v.* Marsh, 5 Wend. 44.

[3] 10 Gray, 496.

[4] 11 Allen, 370. See also Lee *v.* Clark, 1 Hill, 56; Rapelye *v.* Prince, 4 Hill, 119; Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275.

recital as to some of the facts; provided the facts were agreed to in good faith.[1]

In some cases parties liable over by way of indemnity are bound by judgment against the person to whom they are so liable even without notice, as where they have so stipulated with the latter.[2] Such cases will of course depend upon the construction to be placed on the contract of indemnity. On the other hand, since there can be no contribution between wrongdoers acting knowingly, no notice by one wrongdoer or defendant to another will be effectual to bind the latter; though had it not been for the participation of the defendant, the notice would have been good.[3]

Of course the rule of estoppel does not prevail in other cases where parties interested are not legally notified,[4] even though they have full knowledge of the proceedings.[5] In Jones *v.* Oswald, before the Court of Appeals of South Carolina, the plaintiff brought an action against the sureties of Oswald, a sheriff, on their official bond, alleging non-payment of money collected on execution. The defendants pleaded in bar a former judgment against Oswald for the same money. The plea was overruled in the court below; and the decision was sustained on appeal. Mr. Justice Johnson said that a judgment against one of a number of joint and several obligors without satisfaction was no bar to a recovery against the others. Whatever might have been the effect of the recovery in regard to Oswald, in this case the liability of the sureties remained precisely as it was before the former trial. They were not parties to the suit, and would not have been liable in the first form of action.

[1] See also, concerning notice to warrantors, Bell *v.* Dagg, 60 N. Y. 528; Blasdale *v.* Babcock, 1 Johns. 517; Kelly *v.* Dutch Church, 2 Hill, 105; Collingwood *v.* Irvin, 3 Watts, 306; Paul *v.* Witman, 3 Watts & S. 407.

[2] Thomas *v.* Hubbell, 15 N. Y. 405; s. c. 30 N. Y. 120; Fay *v.* Ames, 44 Barb. 327; Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275.

[3] Knox *v.* Sterling, 73 Ill. 214; Severin *v.* Eddy, 52 Ill. 189; Chicago *v.* Robbins, 4 Wall. 657.

[4] Jones *v.* Oswald, 2 Bail. 214; Kramph *v.* Hatz, 52 Penn. St. 525; Chant *v.* Reynolds, 49 Cal. 213; Valentine *v.* Mahoney, 37 Cal. 389; Altschul *v.* Polack, 55 Cal. 633. Indeed, though a party liable over was duly notified, if suit was afterwards dismissed in regard to him and his defence stricken from the record, the judgment will not estop him. Altschul *v.* Polack, supra.

[5] Brooklyn *v.* Insurance Co., 99 U. S. 362.

Indeed, judgment does not necessarily bind all the parties to an action; for it may happen that a special issue has been joined in a case in which there are more than two parties, between a portion of them only. In such a case the decision of the issue has no binding force against the others[1] except, of course, so far as it may without fraud establish some special relation between such particular parties.

The question whether one who appeared as a witness in a former action is estopped by the judgment in a subsequent suit between one of the parties and the witness has arisen, and has been decided in the negative.[2] Yorks *v.* Steele, just cited, was an action to recover possession of a horse. The plaintiff was nonsuited at the trial on the ground that he had appeared as a witness for the then defendant in an action successfully brought by the present defendant against a sheriff who had taken the horse in execution in favor of another against himself, the present plaintiff. This was adjudged error.[3] The case *may* be different if the witness were for any reason liable over to the

[1] Harvey *v.* Osborne, 55 Ind. 535. But in a case of separate pleading by two defendants in a proceeding to quiet title, the finding that one of them owns the land concludes the other. Devin *v.* Ottumwa, 53 Iowa, 461.

[2] Yorks *v.* Steele, 50 Barb. 397; Parker *v.* Moore, 59 N. H. 454; Wright *v.* Andrews, 130 Mass. 149; Blackwood *v.* Brown, 32 Mich. 104; Schroeder *v.* Lahrman, 26 Minn. 87. See Hobbs *v.* McLean, 117 U. S. 567, 580. So, a party is not estopped to deny the statement of a witness by the fact that the witness had, in former trials of the same action, made the same statement without contradiction. McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65. Nor is one estopped to deny what one has admitted on the witness stand. Wilkinson *v.* Wilson, 71 Ga. 497 (Contra in Louisiana. Folger *v.* Palmer, 35 La. An. 743; ante, p. 114, note 1.) Unless, indeed, in a proper case it has been acted upon. Leinkauff *v.* Munter, 76 Ala. 194; Hobbs *v.* McLean, supra.

[3] In delivering judgment Mr. Justice Johnson said: 'It is a general if not universal principle that an action and judgment between two persons shall not bind or affect a third person who could not be admitted to make a defence, to examine witnesses, or to appeal from the judgment. Case *v.* Reeve, 14 Johns. 79; Castle *v.* Noyes, 14 N. Y. 329, 332; Greenl. Ev. § 523. . . . It is of no consequence, prima facie, that the plaintiff was a witness for the defendant in the action brought by this defendant. He had no right as a witness to examine or cross-examine other witnesses, or to call other witnesses, who might have a better knowledge of the facts than himself. In short, as a mere witness he had no charge or control of the case whatever. And supposing that judgment was erroneous for any reason, he had no right of appeal, and no standing by which he could be heard to correct the error.'

defendant to make him good in case of judgment against him. In Barney *v.* Dewey[1] the defendant had fraudulently induced the plaintiff to buy a horse as his. The horse really belonged to another, who now brought trover for it; in which action the defendant appeared as a witness for the then plaintiff, who prevailed. Such appearance was thought tantamount to an averment of notice to defend, estopping the witness to question the judgment. So too a witness who is the or a real party in interest may be estopped by the judgment.[2]

Again, a judgment for or against one properly occupying a representative position concludes, in ordinary cases, the persons represented.[3] But it may be a difficult question whether such persons were duly represented, or how far they were represented. In equity, to put a single case, it is usually necessary to join the cestui que trust with the trustee in order to obtain a decree which shall bind the former, for generally they are treated as independent of each other;[4] but in some cases it is allowed the trustee to represent the beneficiary.[5] And the result, of course, is that in the absence of fraud the cestuis que trust will be bound by, and after the trust terminates may take advantage of, the decree and the proceedings thereunder.[6] Thus, it is well settled that the cestuis que trust of a mortgagee are not necessary parties to a bill of foreclosure.[7] So too when the beneficiaries are so numerous that it would be very inconvenient to bring them all before the court, it has been considered sufficient for part of them to sue as plaintiffs on behalf of all.[8] But this

[1] 13 Johns. 224.

[2] Cole *v.* Favorite, 69 Ill. 457; Bennitt *v.* Star Mining Co., 119 Ill. 9, 15.

[3] Graham *v.* Boston R. Co., 118 U. S. 161, corporation; Harmon *v.* Auditor of Public Accts., 123 Ill. 122, 130, municipal corporation; Bennitt *v.* Star Mining Co., 119 Ill. 9; Cole *v.* Favorite, 69 Ill. 457.

[4] Collins *v.* Lofftus, 10 Leigh, 5; Shay *v.* McNamara, 54 Cal. 169.

[5] Whitford *v.* Crooks, 54 Mich. 261. And where there are several cestuis que trust, it makes no difference after a recovery of property by the trustee for them that their respective rights therein have not been determined. Upon the termination of the trust any of them may have the benefit of the judgment. Ibid.

[6] Johnson *v.* Robertson, 31 Md. 476; Corcoran *v.* Chesapeake Canal Co., 94 U. S. 741.

[7] Willink *v.* Morris Canal Co., 3 Green's Ch. 377; Van Vechten *v.* Terry, 2 Johns. Ch. 197; New Jersey Franklinite Co. *v.* Ames, 1 Beasl. Ch. 507; Johnson *v.* Robertson, 31 Md. 476.

[8] Adair *v.* New River Co., 11 Ves. 429; Cockburn *v.* Thompson, 16 Ves. 321; Harrison *v.* Stewardson, 2 Hare, 530.

rule applies only to cases where there is one general right in all the parties; that is, where the character of all parties, so far as the right is concerned, is homogeneous.[1] In other cases, notwithstanding the inconvenience arising from a great number of parties, they must all be before the court in order to be bound by the adjudication.[2] This in the case cited was said of creditors in a question of priority of charging real estate; but the principle is probably general, and equally applicable to similar questions affecting cestuis que trust.

It has been a matter of doubt whether a judgment obtained against a corporation could be used against a stockholder thereof, under statutes imposing a personal liability on the members of the corporation for the corporation debts.[3] Mr. Chancellor Kent had held the negative; but his judgment was reversed by the Court of Errors.[4] The doctrine held on the appeal is generally understood as deciding that the judgment establishes a prima facie but not conclusive liability on the part of the stockholder.[5] But it has since been doubted whether the Court of Errors intended to go even so far as this;[6] and later still in Belmont *v.* Coleman[7] a majority of the Court of Appeals were unwilling to concur in the dictum of one of their number that such judgment was prima facie evidence against a stockholder.[8] It is clear that the corporation cannot be estopped by judgment against the stockholders individually.[9]

[1] Newton *v.* Egmont, 5 Sim. 130, 137. Comp. Thames *v.* Jones, 97 N. Car. 121.

[2] Newton *v.* Egmont, supra.

[3] Judgment against a corporation of course binds the members thereof, in the absence of fraud, for all the purposes of the judgment. Graham *v.* Boston R. Co., 118 U. S. 161. So, judgment against a municipality concludes the citizens thereof individually. Harmon *v.* Auditor of Public Accounts, 124 Ill. 122, 130; State *v.* Rainey, 74 Mo. 229; Morris Co. *v.* Hinchman, 31 Kans. 729, 737; Lyman *v.* Faris, 53 Iowa, 498; Clark *v.* Wolf, 29 Iowa, 197. See, however, Jenkins *v.* Robertson, L. R. 1 H. L. Scotch, 117, 121.

[4] Slee *v.* Bloom, 5 Johns. Ch. 366; reversed, 19 Johns. 456; s. c. 20 Johns. 669.

[5] Moss *v.* Oakley, 2 Hill, 265.

[6] Moss *v.* McCullough, 5 Hill, 131; s. c. 7 Barb. 279; 5 Denio, 567.

[7] 21 N. Y. 96.

[8] See also Squires *v.* Brown, 22 How. Pr. 35; Miller *v.* White, 59 Barb. 434; s. c. rev. 13 Abb. Pr. N. S. 185, note; Hall *v.* Sigel, 13 Abb. Pr. N. S. 178; Lowry *v.* Inman, 2 Sweeny, 117; s. c. 46 N. Y. 119; Brooks *v.* Hill, 1 Mich. 124; Berger *v.* Williams, 4 McLean, 577; Merchants' Bank *v.* Chandler, 19 Wis. 434.

[9] Covington & L. R. Co. *v.* Bowler, 9 Bush, 468.

The effect of a judgment upon garnishment or trustee process in suits by the original creditor of the garnishee or trustee against the latter has frequently arisen.[1] Compulsory payment in full is of course a discharge. Such a case, it was thought, was Wetter *v.* Rucker;[2] but it appeared as matter of law that the payment by the garnishees to the judgment creditor of their own creditor was not a compulsory but a voluntary payment. The court therefore held that the garnishees were not discharged.

A more difficult point is presented by the question whether judgment against the garnishee *without* satisfaction bars an action by his original creditor. The English doctrine in Savage's Case[3] is that attachment and condemnation are a good discharge. So in Maine judgment against the trustee having been rendered and duly recorded is conclusive upon the creditor of the trustee to the extent of the judgment,[4] provided the judgment be final. Judgment by default will not discharge the trustee.[5] The same doctrine prevails in other states.[6] But in some of the states the garnishee is not considered discharged without satisfaction.[7] The better opinion, however, would seem to be that the garnishee is discharged, as against his creditor, as soon as the law places him under a compulsory obligation to pay the plaintiff in attachment; otherwise he might be subjected to much unnecessary annoyance without fault of his own.

But according to the custom of London, execution must be

[1] The trustee or garnishee (duly notified) is bound by the judgment against himself, though he failed to appear and was defaulted. Flanagan *v.* Cutter, 121 Mass. 96, overruling a dictum in Brown *v.* Neale, 3 Allen, 74.

[2] 1 Brod. & B. 491; s. c. 4 B. Moore, 172.

[3] 1 Salk. 291. But in note 1 to Turbill's Case, 1 Wms. Saund. 660, it is said the garnishee 'shall be quit against the other after execution sued out by the plaintiff;' and this seems to be the modern English rule. Wetter *v.* Rucker, 1 Brod. & B. 491; and other cases, supra.

[4] McAllister *v.* Brooks, 22 Maine, 80; Norris *v.* Hall, 18 Maine, 332; Matthews *v.* Houghton, 11 Maine, 377.

[5] Sargeant *v.* Andrews, 3 Greenl. 199. In Florida: Sessions *v.* Stevens, 1 Fla. 233. In Massachusetts, execution must have issued: Meriam *v.* Rundlett, 13 Pick. 511. See also Cheongwo *v.* Jones, 3 Wash. C. C. 359. So in Maryland: Brown *v.* Summerville, 8 Md. 444. And in Pennsylvania: Lowry *v.* Lumberman's Bank, 2 Watts & S. 210.

[6] In Indiana: Covert *v.* Nelson, 8 Blackf. 265.

[7] In Alabama: Cook *v.* Field, 3 Ala. 53. In Texas: Farmer *v.* Simpson, 6 Tex. 303. In Georgia: Brannon *v.* Noble, 8 Ga. 549. See also Flower *v.* Parker, 3 Mason, 247.

executed before the garnishee is discharged from liability to his own creditor. In a case before the Common Pleas[1] the defendant to an action for money had and received pleaded a recovery by foreign attachment at the suit of a creditor of the plaintiff, and that the creditor had had execution. The plaintiff replied that the execution had not been executed; upon which the defendant joined issue. Verdict was found for the plaintiff, subject to the opinion of the court upon the points of law and fact involved; and the court ruled that the replication was good. It was said that if the execution in the garnishment process had not been executed, the garnishee was not discharged.[2]

If, however, the execution was levied and satisfied, the garnishee is protected and discharged to the extent of the amount paid, though the judgment be erroneous,[3] provided he availed himself of all defences against the attaching creditor.[4] And this too, though the proceeding be in a foreign jurisdiction.[5] The original creditor of the garnishee is not, however, estopped to prove that his claim is greater than that admitted by the garnishee; otherwise it would be in the power of the latter to practise an irreparable fraud upon the former.[6] Nor is the garnishee's

[1] Magrath *v.* Hardy, 4 Bing. N. C. 782.

[2] See Home Ins. Co. *v.* Gamble, 14 Mo. 407; Burnap *v.* Campbell, 6 Gray, 241; Brown *v.* Summerville, 8 Md. 444.

[3] Brown *v.* Dudley, 33 N. H. 511; Stearns *v.* Wrisley, 30 Vt. 661; Stevens *v.* Fisher, 30 Vt. 200; Dole *v.* Boutwell, 1 Allen, 286; Wise *v.* Hilton, 4 Greenl. 435; Killsa *v.* Lermond, 6 Greenl. 116; Anderson *v.* Young, 21 Penn. St. 443; Drake, Attachment, § 706, and cases cited.

[4] Funkhouser *v.* How, 24 Mo. 44; Gates *v.* Kerby, 13 Mo. 157; Dobbins *v.* Hyde, 37 Mo. 114; Newton *v.* Walters, 16 Ark. 216; post, p. 141.

[5] Barrow *v.* West, 23 Pick. 270; Taylor *v.* Phelps, 1 Har. & G. 492; Drake, Attachment, supra.

[6] Robeson *v.* Carpenter, 7 Mart. N. s. 30; Brown *v.* Dudley, 33 N. H. 511; Tams *v.* Bullitt, 35 Penn. St. 308; Baxter *v.* Vincent, 6 Vt. 614. See also Hirth *v.* Pfeifle, 42 Mich. 31.

Without pursuing this matter into detail, we give the concise statement of Chief Justice Drake of the rules upon the subject (Attachment, § 711, a work to which it is hardly necessary to direct the reader's particular attention):—

'1. The judgment against the garnishee, under which he alleges he made the payment, must be proved. Barton *v.* Smith, 7 Iowa, 85.

'2. It must have been a valid judgment. No payment made under a void judgment, however apparently regular the proceedings may have been, can protect the garnishee against a subsequent payment to the defendant [i. e. the garnishee's creditor] or his representatives. Thus, where an attachment was obtained against one supposed to be living in a foreign country, but who was dead when the suit was commenced, it was held that a payment made by a

creditor estopped by judgment in favor of the garnishee in the

garnishee under execution was no defence against an action by the defendant's administrator; the whole proceedings in the suit being a mere nullity. Loring *v.* Folger, 7 Gray, 505; Matthey *v.* Wiseman, 18 Com. B. N. s. 657. See Westoby *v.* Day, 2 El. & B. 605. Nor will a judgment against a garnishee protect him against a subsequent recovery in favor of one who had previously to the garnishment taken an assignment of the debt from the defendant in the attachment, the garnishee having notice of the assignment. Dobbins *v.* Hyde, 37 Mo. 114.

'3. The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and therefore no protection to the garnishee. Wetter *v.* Rucker, 1 Brod. & B. 491, and cases cited supra.

'4. The payment must be actual, and not simulated or contrived. Thus, when certain persons were charged as garnishees, and credited the plaintiff on their books with the amount of the judgment, and debited the defendant with the same amount, but did not in fact pay the money, it was held to be no payment. Wetter *v.* Rucker, supra.

'5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-matter and the parties. (*a*) If there be a defect in this respect, the payment will be regarded as voluntary, and therefore unavailing. Harmon *v.* Birchard, 8 Blackf. 418; Ford *v.* Hurd, 4 Smedes & M. 683; Robertson *v.* Roberts, 1 A. K. Marsh. 247; Richardson *v.* Hickman, 22 Ind. 244. If, however, the court have jurisdiction of the subject-matter and the parties, a payment on execution under its judgment will protect the garnishee though the judgment may have been irregular and reversible on error (Lomerson *v.* Hoffman, 4 Zabr. 674; Pierce *v.* Carleton, 12 Ill. 358; Gunn *v.* Howell, 35 Ala. 144; Webster *v.* Lowell, 2 Allen, 123); and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment. Duncan *v.* Ware, 5 Stew. & P. 119. But if the garnishee contest the jurisdiction of the court, and his objection is overruled and judgment rendered against him, a payment made by him under that judgment cannot be collaterally impeached elsewhere on the ground that the court had no jurisdiction. Its decision on that point is conclusive in favor of the garnishee. Gunn *v.* Howell, 35 Ala. 144; Wyatt *v.* Rambo, 29 Ala. 510; Thayer *v.* Tyler, 10 Gray, 164; Pratt *v.* Cunliff, 9 Allen, 90.

'6. Though the court have jurisdiction of the parties, and its judgment be valid against the garnishee, yet if the law require the plaintiff as a condition precedent to obtaining execution to do a particular act, and without performing the condition he obtain execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which his payment is regarded as voluntary. Myers *v.* Uhrich, 1 Binn. 25; Moyer *v.* Lobengeir, 4 Watts, 390; Oldham *v.* Ledbetter, 1 How. (Miss.) 43; Grisson *v.* Reynolds, ib. 570.'

(*a*) When the defendant was personally before the court, the garnishee is not interested in the matter of jurisdiction as against the *defendant;* but if he is not personally before the court, the garnishee is concerned in the question of jurisdiction both as to the defendant and as to himself. Drake, Attachment, § 693. See Wheeler *v.* Aldrich, 13 Gray, 51; Morrison *v.* New Bedford Inst. for Savings, 7 Gray, 269; Thayer *v.* Tyler, 10 Gray, 164; Pratt *v.* Cunliff, 9 Allen, 90.

garnishment proceedings.[1] The creditor has nothing to do with that matter.

Though it is a general principle that the payment by a garnishee of the full amount of his indebtedness will bar a proceeding against him on the debt by his own creditor, the doctrine is to be received with this qualification, that the judgment on the garnishment process was fairly obtained. If the garnishee was guilty of any collusion or fraud, he will be liable to pay a second time.[2] In the case first cited the defendant had been summoned as trustee or garnishee of the plaintiff in an action in Connecticut against the latter instituted subsequently to the present suit; he failed then to make any disclosure to the Connecticut court of the pendency of the action by his creditor in Massachusetts; and the court held that in view of this fact, which would have been sufficient to abate the trustee process,[3] he must pay again.

In Wilkinson *v.* Hall, above cited, the defendant, maker of a negotiable promissory note, had been served with trustee process in Vermont after the negotiation of the note, and charged as trustee of the payee. The indorsee and plaintiff offered to prove that the defendant had knowledge of the transfer of the paper before the service in Vermont; which fact, had it there been disclosed, would have defeated the garnishment.[4] The court said that the fact of negotiation before the service of the trustee process was most material to the right determination of the cause; and if the defendant had knowledge of the transfer, he was bound to disclose it. The garnishee to be protected against his creditor should, in a word, avail himself of all defences which exist at the time in regard to the debt owed by him (the garnishee) to his own creditor.[5]

A judgment discharging the garnishee for holding personal property of the principal defendant under a fraudulent and void

[1] Ruff *v.* Ruff, 85 Penn. St. 333.

[2] Whipple *v.* Robbins, 97 Mass. 107; Wilkinson *v.* Hall, 6 Gray, 568; Hall *v.* Blake, 13 Mass. 153; 2 Kent, Com. 119.

[3] See Wallace *v.* McConnell, 13 Peters, 136; Embree *v.* Hanna, 5 Johns. 100.

[4] Barney *v.* Douglass, 19 Vt. 98; Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, ib. 594.

[5] Pierce *v.* Chicago R. Co., 36 Wis. 283; ante, p. 139.

conveyance will bar an action on the case directly against the garnishee for aiding in the same alleged fraudulent transfer of property to secure it from the creditors of the former defendant.[1] The court in the case cited said that the validity or invalidity of the sale from the former to the present defendant was an issue between the plaintiff and the garnishee in that suit precisely as in the present. The plaintiff had failed in the contest against the garnishee; and the judgment of the court had been that the sale was valid, and consequently that the garnishee must be discharged. If the court had regarded the sale as fraudulent, the garnishee must have been charged.

Having ascertained the effect of judgment estoppels upon the actual parties to the record, let us now inquire into the effect and operation of personal judgments against those who were in no way parties to the former suit, but who still, as being privies, were affected by the judgment. In the law of estoppel one person becomes privy of another (1) by *succeeding* to the position of that other as regards the subject of the estoppel, (2) by *holding* in subordination to that other. Lord Coke divides privity into privity in law, i. e. by operation of law, as tenant by the curtesy; privity in blood, as in the case of ancestor and heir; and privity in estate, as by subordination of tenure represented by the case of feoffor and feoffee. These divisions are only important, as far as this work is concerned, in defining the extent of the doctrine of privity; and as the rules of law are not different in questions of estoppel in these divisions, it will not be necessary to present them separately.

But it should be noticed that the ground of privity is property and not personal relation. To make a man a privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party subsequently to the action,[2] or he must hold property subordi-

[1] Bunker *v.* Tufts, 57 Maine, 417.

[2] Bryan *v.* Malloy, 90 N. Car. 508, 511; Dooley *v.* Potter, 140 Mass. 49, 53 (doubting Stevens *v.* Miner, 5 Gray, 429, note); Scates *v.* King, 110 Ill. 456; Zoeller *v.* Riley, 100 N. Y. 102; Chester *v.* Bakersfield Assoc., 64 Cal. 42; Coles *v.* Allen, 64 Ala. 98. Hence A and B, claiming under deeds made by the same grantor before the suit, are not privies under the judgment. Bryan *v.* Malloy, supra. So of C, who acquired

nately. Thus, to give an illustration of privity by succession, an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made,[1] though if the judgment had preceded the assignment the case would have been different.[2] Nor is a grantee of land affected by judgment concerning the property against his grantor in the suit of a third person begun after the grant.[3] Judgment in such cases bars those only whose interest is acquired after the suit;[4] and not even those if the title acquired since the judgment was some title paramount not in issue legally in the former suit.[5] Newly acquired rights of a distinct nature cannot be bound by any kind of estoppel except the peculiar kind called 'title by estoppel.'[6]

The case of privity by subordination may be illustrated, as we have seen, by the common-law relation of feoffor and feoffee. That is Coke's illustration. A more familiar one to lawyers of the present time is afforded by the relation of landlord and tenant. A lawful judgment which deprives the landlord of the estate deprives the tenant, of necessity, of his subordinate right.

But there is this important difference between privity by succession and privity by subordination. In privity by suc-

title from B *after* the suit began, for he would be no better off than B. A foreclosure decree, however, could be offered in evidence by one claiming under it, as a link in his chain of title, against one claiming in opposition to it. Scates *v.* King, supra.

[1] Todd *v.* Flournoy, 56 Ala. 99; Coles *v.* Allen, 64 Ala. 98. Of course bona fide purchasers without notice are not privies. Hager *v.* Spect, 52 Cal. 579.

[2] Not where the assignee represents others, however, as e. g. creditors of the assignor. Of course judgment for or against an assignee in a suit with a third person has no force in regard to the assignor. Donald *v.* Gregory, 41 Iowa, 513.

[3] Mathes *v.* Cover, 43 Iowa, 512. Indeed, the true reason why a grantee is affected in any case by the prior act of his grantor rests either on notice or on absence of title as the result of that act, and not on privity. Grantor and grantee are not in privity in the law of estoppel, as will be seen in chapter 8. Further, concerning privity, see Mayo *v.* Wood, 50 Cal. 171; Barrett *v.* Birge, ib. 655. Privity in estate in estoppel is rightly put in 20 Am. Law Rev. 407 et seq.

[4] Shay *v.* McNamara, 54 Cal. 169; Campbell *v.* Hall, 16 N. Y. 575; Doe *v.* Derby, 1 Ad. & E. 783.

[5] Bickett *v.* Nash, 101 N. C. 579; Johnson *v.* Farlow, 13 Ired. 84. There is no distinction between judgment touching land and judgment touching personalty. Bickett *v.* Nash, supra.

[6] See e. g. Mowatt *v.* Castle Steel Co., 34 Ch. D. 58, estoppel in pais; East Alabama R. Co. *v.* Tennessee R. Co., 78 Ala. 274, same. See also note 2 to the first page of chapter 13.

cession the privy takes, commonly at least, as a volunteer, i. e. without value; hence a party, by joining in a collusive judgment, could bind the mere privy. In privity by subordination, however, the privy, commonly at least, has taken for value; hence the fraud of the party to a collusive judgment would *not* bar him. Fraud bars the wrongdoer and volunteers under him, not innocent purchasers for value.

The rule, however, under either aspect of privity, is that a valid judgment is conclusive, not only against the actual parties to the particular litigation, but also against all persons who claim under them as privies. The doctrine is illustrated in Regina *v.* Blakemore.[1] The defendant was indicted for the non-repair of a highway which it was alleged he was bound to repair ratione tenuræ, in respect of certain lands called Sawpit. To prove this liability the record of the conviction of one under whom the defendant claimed was produced, in an indictment for the non-repair of the same premises, alleging his liability to repair ratione tenuræ. And the record was held conclusive.

The plaintiff in Adams *v.* Barnes[2] brought an action to recover certain lands, in which the following facts appeared: The defendant Barnes had loaned money to one Ingersoll on a mortgage of the premises in question. Subsequently he brought an action against Ingersoll to recover possession, in which suit the latter pleaded usury. But judgment was given for Barnes, the present defendant; and he was put into possession by the sheriff. Afterwards Ingersoll sold and conveyed all his right, title, and interest in the premises to the present plaintiff, who brought this action to recover the premises. He offered evidence to prove usury in the original contract between Barnes and Ingersoll, his grantor; but the defendant contended that he was estopped by the former judgment, and the court sustained the objection. Mr. Justice Jackson said that Ingersoll would have been estopped; and it was clear that the plaintiff was also estopped. It was such an estoppel as ran with the land, and extended to all who were privy in estate to either of the parties to the former judgment. Such an estoppel made part of the title to the land, and extended to all who claimed under either of the

[1] 2 Den. Cr. C. 410. [2] 17 Mass. 365.

parties. By the former judgment Ingersoll had lost his title to the land, and Barnes had acquired a right which was indefeasible as between him and Ingersoll to hold possession of the land until the debt was paid. And it would be highly inequitable if Ingersoll could convey to a stranger the right to bring Barnes's title again into controversy. Ingersoll after the judgment had no estate left in him except the right to redeem; and his grantee could not claim any greater estate. The learned judge stated further that the present estoppel was also founded on those principles of law which were intended to repress litigation. If the plaintiff could now contest Barnes's title under the mortgage, Ingersoll must have assigned him a mere right of action, which was prohibited by law. And again, if the plaintiff could purchase that right of action, he could sell it; and therefore if he should try this action on its merits and fail to recover, he might assign the right to another, and the assignee might after suit assign to a third, and so on.

In Pritchard *v.* Hitchcock [1] the plaintiff sued the defendant as guarantor of the acceptor of a bill of exchange; and the latter pleaded payment by the acceptor. The facts were that the acceptor when in a state of complete insolvency had paid the amount to the plaintiff; but the money was subsequently recovered from the plaintiff in an action by the acceptor's assignees in bankruptcy. The guarantor now sued contended that the payment by the acceptor to the plaintiff was a satisfaction. The plaintiff, on the other hand, urged that the recovery by the assignees was conclusive evidence against the guarantor that they were entitled to the money; and this being the case that the debt had not been satisfied. The court held the judgment to be evidence, but ruled that it was not conclusive. The decision shows that in the relation of guarantor and principal no privity in the sense in which the law of estoppel is applied exists; and the same is true by the weight of authority of the relation of surety and principal, co-sureties inter se,[2] prin-

[1] 6 Man. & G. 151; 6 Scott N. R. 851.

[2] Means *v.* Hicks, 65 Ala. 241, holding that judgment against one of two sureties is no evidence of the common liability of the two, against the other for contribution, if he was not a party to the former suit.

cipal and agent,[1] and the like cases where parties are answerable over.[2] There is no succession of rights and duties to the new party in such cases. Nor is there any just ground for holding with some of the cases [3] that the judgment should still be conclusive in the absence of fraud; unless the surety has agreed to pay whatever may be found due on the judgment.[4] It is enough that the judgment has been held prima facie evidence of the surety's liability.[5]

The relationship of privity does not exist at common law [6] between administrator or executor and heir or devisee so as to make a judgment against the decedent's representative binding

[1] Warner *v.* Comstock, 55 Mich. 616, 620.

[2] Ex parte Young, 17 Ch. D. 668, C. A., following Douglass *v.* Howland, 24 Wend. 35; State *v.* Woodside, 7 Ired. 296; McKellar *v.* Bowell, 4 Hawks, 34; Beall *v.* Beck, 3 Har. & McH. 242. See also King *v.* Norman, 4 C. B. 884; Stewart *v.* Thomas, 45 Mo. 42. The early case of Baker *v.* Preston, Gilmer (Va.), 235, to the contrary in regard to principal and surety, with a few cases which followed it (State *v.* Grammer, 29 Ind. 530; State *v.* Prather, 44 Ind. 287), has been effectually overruled. Munford *v.* Overseers, 2 Rand. 313; Jacobs *v.* Hill, 2 Leigh, 393; Craddock *v.* Turner, 6 Leigh, 116; Crawford *v.* Turk, 24 Gratt. 176; Ohning *v.* Evansville, 66 Ind. 59; State *v.* Rhoades, 6 Nev. 352. The old doctrine is followed within limits in Stovall *v.* Banks, 10 Wall. 583; Evans *v.* Commonwealth, 8 Watts, 398; Masser *v.* Strickland, 17 Serg. & R. 354, Gibson, C. J. dissenting; Hailey *v.* Boyd, 64 Ala. 399; Martin *v.* Tally, 72 Ala. 23, 29, 30; Grimmet *v.* Henderson, 66 Ala. 521; Larkins *v.* Mason, 71 Ala. 227; Fretwell *v.* McLenore, 52 Ala. 124; Watts *v.* Gayle, 20 Ala. 817, 825; Wright *v.* Lang, 66 Ala. 389; Grace *v.* Martin, 47 Ala. 135; Stoops *v.* Whistler, 1 Mo. App. 420. See also Fall River *v.* Riley, 140 Mass. 488, 489; Tracy *v.* Goodwin, 5 Allen, 409. In Stoops *v.* Whistler the court referred to Slee *v.* Bloom, 20 Johns. 669, and Bergen *v.* Williams, 4 McLean, 125. It was admitted that Douglass *v.* Howland, 24 Wend. 35, 58, was contra. Every distinct party should have the right to try his own case. The principal may be hostile to the surety, or indifferent to the surety's interests, and the surety ignorant of the fact. It is conceded in Martin *v.* Tally, 72 Ala. 23, 30, that the judgment does not bind the surety in a case in which he had no right to appear and defend. The law of Alabama is statutory. Ibid.

[3] Cases in note 2, supra, especially Fall River *v.* Riley. But a surety in a bond to pay a judgment against his principal, rendered or to be rendered, will be bound by such judgment if obtained without fraud or collusion. Way *v.* Lewis, 115 Mass. 26; Cutter *v.* Evans, ib. 27; Ex parte Young, 17 Ch. D. 668. That is another thing; it is merely a decision of debtor and creditor between those entitled to a decision. See Candee *v.* Lord, 2 Comst. 269; ante, p. 48; post, pp. 150, 151.

[4] Note 3, supra.

[5] The sureties may show that the court had no jurisdiction over the principal. Fall River *v.* Riley, 140 Mass. 488.

[6] It is otherwise by statute in California. Cunningham *v.* Ashley, 45 Cal. 485.

upon the lands of the heir or devisee.[1] Such a judgment upon a debt of the decedent would not, e. g. estop the heir or devisee to set up the Statute of Limitations to the debt in defence of a bill in equity by the personal representative to subject the decedent's land to the payment of the demand.[2] But it is held that judgment against the executor is prima facie evidence of the extent of the testator's liability in a scire facias against the heir to subject the land in the hands of the heir.[3] Of course no act or omission of an executor or administrator can bind those interested in the estate, unless they or the decedent or the law[4] authorized it.[5]

[1] Garnett *v.* Macon, 6 Call, 308; Stone *v.* Wood, 16 Ill. 177; Dorr *v.* Stockdale, 19 Iowa, 269; Moss *v.* McCullough, 5 Hill, 131; Alston *v.* Munford, 1 Brock. 266; Scott *v.* Ware, 64 Ala. 174; Starke *v.* Wilson, 65 Ala. 576; Boykin *v.* Cook, 61 Ala. 472; Lehman *v.* Bradley, 62 Ala. 31; Teague *v.* Corbitt, 57 Ala. 529. In the case first cited Marshall, C. J. in the Circuit Court of the United States for Virginia, said: 'The defendants insist that the decree against the personal representative of George Brooks is conclusive evidence against the devisee of the existence of the debt. The cases cited by counsel in support of this proposition do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator as the legal owner of his personal property for the payment of his debts in the first instance, and is consequently the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit, cannot controvert the testimony, adduce evidence in opposition to the claim, or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir who does not claim under the executor should be estopped by a judgment against him. . . . In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir as devisee may, indeed, in a Court of Chancery be united with the executor in the same action; but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is in substance the foundation of the proceeding against the heir as devisee, the argument for considering it as prima facie evidence may be irresistible; but I cannot consider it as an estoppel. The judgment not being against the person representing the land ought, I think, on the general principle which applies to give records in evidence, to be re-examinable when brought to bear upon the proprietor of the land.' That the judgment is *no* evidence against the heir, see the Alabama cases above cited.

[2] Starke *v.* Wilson, 65 Ala. 576.

[3] Sergeant *v.* Ewing, 36 Penn. St. 156.

[4] As by authorizing an administrator to sell lands for the payment of debts of the estate. Speer *v.* James, 94 N. Car. 417.

[5] As where an executor before quali-

An administrator is of course in privity with his intestate in respect of the personalty;[1] and an executor is in privity with the deceased to the extent to which by the terms of the will he succeeds to the position of his testator.[2] So too the heir and the devisee are in privity with the ancestor or devisor.[3] It might also be supposed that an administrator de bonis non would be in privity with his predecessor, the executor or administrator; and so some of the authorities declare.[4] But this position seems to be incorrect. An *executor* of an executor is bound as a privy by that which binds his predecessor. The power of an executor being founded on the special confidence reposed in him by the deceased, he is allowed to transmit that power to another.[5] But an administrator, being merely the officer of the ordinary, appointed by law, in whom the deceased cannot be said to have reposed any confidence, cannot transmit his office; and if he should die before closing his administration, the office would result back to the court for the appointment of a successor. So, when an executor dies intestate, his administrator does not represent the testator; and it now devolves upon the court, as in the other case, to commit administration afresh with the will annexed.[6] The administrator de bonis non does not derive his title in any way from his predecessor in the administration; he does not succeed to the same property, but to the unadministered remainder. Hence there cannot in principle be any privity between them. It has even been held that judgment against an administrator in chief is no evidence against his successor of the justness of the demand;[7] but that

fication failed to defend an application concerning homestead. Killen *v.* Marshall, 55 Ga. 340. See also Allen *v.* Morgan, 61 Ga. 107.

[1] Steele *v.* Lineberger, 59 Penn. St. 308.

[2] Manigault *v.* Deas, 1 Bailey, Eq. 283; Ladd *v.* Durkin, 54 Cal. 395.

[3] Boykin *v.* Cook, 61 Ala. 472.

[4] Ibid.; Stacy *v.* Thrasher, 6 How. 44. The latter case, however, is but a dictum, and even thus is only to the effect that a scire facias or action upon a judgment obtained by the predecessor may be maintained by the administrator de bonis non. Dykes *v.* Woodhouse, 3 Rand. 287. There was some dispute even on this point in the old cases. Ibid.

[5] Contrary, however, to the analogous case of agency.

[6] Coleman *v.* McMurdo, 5 Rand. 51; Thomas *v.* Sterns, 33 Ala. 137; Hudgens *v.* Cameron, 50 Ala. 379. See Attorney-General *v.* Hooker, 2 P. Wms. 338, 340; Rutland *v.* Rutland, ib. 210.

[7] Rogers *v.* Grannis, 20 Ala. 247; Thomas *v.* Sterns, 33 Ala. 137, 143.

may be doubted. The judgment may bind the successor without privity.[1]

It is well settled that there is no privity between executors or administrators appointed in different states or countries.[2] A striking illustration of this rule is found in Pond *v.* Makepeace.[3] The case in substance was this: The plaintiff, as administrator of Oliver Capron under the laws of Massachusetts, brought suit in that state against the defendants on a note given to the intestate; and the defence was that an administrator, appointed under the laws of Rhode Island, but not under those of Massachusetts, had brought suit in the latter state upon the same note, obtained judgment upon default, and had execution satisfied. But the court held that the second suit was proper. Mr. Justice Dewey, speaking for the court, said that the proceedings in the suit by the Rhode Island administrator were wholly without authority, and might have been defeated by an appearance and the filing of a proper plea; and the defendants, having neglected to contest the right of the plaintiff in the former suit, could not now plead it in bar of the present action, notwithstanding the satisfaction.

The rule of privity applies also as well to the judgment itself as a valuable claim as to the subject of the judgment and the issues decided by it. Thus, one who buys a judgment succeeds to the rights of the owner and vendor as a privy.[4] It may be added that the rule in regard to privity does not apply to the case of persons who might possibly have claimed through a party to the former litigation, and whose interests were almost identical with those of such party, if in fact they do not claim through him.[5]

A distinction has been made between cases where the only fact to be established is the right of a creditor against the judg-

[1] Comp. pp. 150, 151, infra.

[2] McLean *v.* Meek, 18 How. 16; Hatchett *v.* Berney, 65 Ala. 39. The point will be fully considered in the chapter on Foreign Judgments in Personam. Of course an administrator is a stranger towards his intestate in regard to land. Hall *v.* Armor, 68 Ga. 449.

[3] 2 Met. 114.

[4] See Bank of California *v.* Shaber, 55 Cal. 322; and comp. Kidder *v.* Blaisdell, 45 Maine, 461.

[5] Spencer *v.* Williams, L. R. 2 P. & D. 230.

ment debtor himself, and cases where such a right may incidentally affect third persons, as when a person is affected by a chain of title under a judgment, sale, and conveyance. In this case it is held that third persons cannot impeach the judgment.[1]

There is still another important exception to the rule that judgments in personam bind only parties and privies. They are conclusive against third persons (in the absence of fraud upon them) of the relationship established between the parties, and of the extent of the relationship, supposing such third persons were not bound with or for the parties found liable.[2] The relation of debtor and creditor, for instance, established by a judgment in favor of A against B, cannot be disputed by C except upon the ground that a fraud against creditors, of whom he is one, or against himself in some other relation, e. g. as surety, has been committed;[3] nor can the amount of the judg-

[1] Baylor *v.* Dejarnette, 13 Gratt. 152, 172; Barney *v.* Patterson, 6 Har. & J. 182, 203; Taylor *v.* Phelps, 1 Har. & G. 492. See Inman *v.* Mead, 97 Mass. 310; Secrist *v.* Green, 3 Wall. 744; Casler *v.* Shipman, 35 N. Y. 533. In Barney *v.* Patterson, just cited, Buchanan, C. J. said: 'The judgment is also objected to on the ground that it is res inter alios acta; the appellant not being a party to the proceedings. But the doctrine that judgments and decrees are only evidence in suits between parties and privies, though generally true, is not applicable to this case; the judgment of the Circuit Court being introduced, not as binding per se upon the rights of the appellant, but only as a document connected with the chain of the appellee's title, and is no more obnoxious to objection than a deed from Brown, or any other title papers equally res inter alios acta, would be.'

[2] See ante, p. 48. We have elsewhere seen that by the better authorities a judgment against a defendant cannot be deemed conclusive evidence to bind others liable with the defendant who were in no way parties to the suit, as in the case of a judgment against a principal debtor, introduced in an action against the surety. Douglass *v.* Howland, 24 Wend. 35; Ex parte Young, 17 Ch. D. 668, C. A. The record is *evidence*, however, against the surety. Ante, p. 146; Drummond *v.* Prestman, 12 Wheat. 516; King *v.* Norman, 4 C. B. 884. The cases in which the judgment is held conclusive upon the surety still permit the surety to show fraud or facts in defence personal to himself. Stovall *v.* Banks, 10 Wall. 583; Jones *v.* Ritter, 56 Ala. 270; Watts *v.* Gayle, 20 Ala. 817, 825; Stoops *v.* Whistler, 1 Mo. App. 420.

With the rule of the text may be compared the effect of decrees in divorce causes and in other cases of the kind, where judgment has been rendered between parties who had the exclusive right to try the cause. Ante, pp. 47, 48.

[3] Raymond *v.* Richmond, 78 N. Y. 351; Pray *v.* Hegeman, 98 N. Y. 351, 362; Curtis *v.* Leavitt, 15 N. Y. 51; Hall *v.* Stryker, 27 N. Y. 596; Candee *v.* Lord, 2 Comst. 275; Brigham *v.* Fayerweather, 140 Mass. 411, 413; Way *v.* Lewis, 115 Mass. 26: Cutter *v.* Evans, ib. 27; Pickett *v.* Pipkin, 64 Ala. 520; Swihart *v.* Spaner, 24 Ohio St. 432; Wingate *v.* Haywood, 40 N. H. 437.

ment debt be contradicted.[1] Third persons cannot object when those who have the exclusive right to settle a question have done so without fraud upon them;[2] in the absence of fraud upon them, those (not being privies) who are not, or from want of interest might not be, parties, have no concern with the judgment, and cannot attack it even for supposed want of jurisdiction,[3] or for fraud upon others.[4] In Candee *v.* Lord, just cited, the plaintiff having filed a bill against certain parties to set aside several alleged fraudulent judgments which stood in the way of a judgment recovered by him against one of the defendants in the bill, the other defendants, not having been parties to the judgment last mentioned, sought to impeach it. But they were not allowed to do so.[5]

The following illustration will also explain the doctrine. A obtains a judgment against B, which becomes a lien upon B's real estate, a house and lot. C then sues and obtains judgment against B, and levies upon the house and lot. Finding the same insufficient to satisfy the two judgments, C cannot, in the

[1] Candee *v.* Lord, 2 Comst. 269; Acker *v.* Leland, 109 N. Y. 5, 16; Voorhees *v.* Seymour, 26 Barb. 569, 585; Sidensparker *v.* Sidensparker, 52 Maine, 481.

[2] See Cincinnati *v.* Dickmeier, 31 Ohio St. 242.

[3] Wilcher *v.* Robertson, 78 Va. 602, non-resident.

[4] Candee *v.* Lord, supra; Brigham *v.* Fayerweather, 140 Mass. 411, 413. The judgment is not to be confused, in its operation, with a judgment in rem binding all the world; that sort of judgment, unlike judgment in personam, binds all men indefinitely. Nor is the relation of debtor and creditor, fixed by a judgment in personam for the plaintiff, a 'status' in the sense of the law of judgments in rem. Ante, p. 48.

[5] In delivering judgment Mr. Justice Gardiner said: 'In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one, unless he acts mala fide. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others: first, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and secondly, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently neither a creditor nor a stranger can interfere in the bona fide litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor, does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors.' See Hills *v.* Sherwood, 48 Cal. 386.

absence of collusion or other fraud, impeach A's judgment by denying the relationship of creditor and debtor established by it between A and B; nor can he dispute the amount of the indebtedness.[1]

The Duchess of Kingston's Case declares that a judgment is not conclusive (1) of matters incidental thereto, or (2) of matters to be inferred by (uncertain) argument from the judgment.[2] The first part of the rule may be formally stated thus: A judgment is conclusive by way of estoppel of facts (necessary facts in a chain as well as the primary facts in issue [3]), and none other, without the existence and proof or admission of which it could not have been rendered.[4] The judgment determines all questions that ought to have been presented.[5] It is often loosely said, indeed, and sometimes held, that a judgment is conclusive of everything that *might* have been litigated in the action;[6] but

[1] See also Chamberlain v. Carlisle, 26 N. H. 540, 553, and cases cited.

[2] See infra, p. 158, note; Lawrence v. Hunt, 10 Wend. 80; Forcey's Appeal, 106 Penn. St. 508, 515; Coffey v. United States, 111 U. S. 436, 445; Williams v. Williams, 63 Wis. 58, 71; Ford v. Ford, 68 Ala. 141, 143. For the second part of the rule in the Duchess of Kingston's Case, see infra, pp. 159 et seq.

[3] School District v. Stocker, 42 N. J. 115; Tuska v. O'Brien, 68 N. Y. 446. But see King v. Chase, 15 N. H. 9; infra, p. 158, note.

[4] Burlen v. Shannon, 99 Mass. 200; s. c. 3 Gray, 387, and 14 Gray, 433; Morse v. Elms, 131 Mass. 151; Leonard v. Whitney, 109 Mass. 265, 268; West v. Platt, 127 Mass. 367; Fuller v. Eastman, 81 Maine, 284, 287; Hill v. Morse, 61 Maine, 541, 543; Morgan v. Burr, 58 N. H. 167: Biggins v. People, 106 Ill. 270; Porter v. Wagner, 36 Ohio St. 471; Crofton v. Cincinnati, 26 Ohio St. 571; Marvin v. Dutcher, 26 Minn. 391; Dixon v. Merritt, 21 Minn. 196; Dunham v. Bower, 77 N. Y. 76; Steinbach v. Relief Ins. Co., ib. 498; Providence v. Adams, 11 R. I. 190; Cook v. Burnley, 45 Tex. 97; Pray v. Hegeman, 98 N. Y. 351, 358; Woodgate v. Fleet, 44 N. Y. 1; People v. Johnson, 38 N. Y. 63; Hardy v. Mills, 35 Wis. 141; Shinn v. Young, 57 Cal. 525; McCalley v. Robinson, 70 Ala. 432; Johnston v. Riddle, ib. 219; Hamner v. Pounds, 57 Ala. 348; Davidson v. Shipman, 6 Ala. 27, 33; Strother v. Butler, 17 Ala. 733; Thomason v. Odum, 31 Ala. 108; Belshaw v. Moses, 49 Ala. 283; McDonald v. Mobile Ins. Co., 65 Ala. 358; Bradley v. Briggs, 55 Ga. 354; Hunter v. Davis, 19 Ga. 413; Supples v. Cannon, 44 Conn. 424.

[5] Burlen v. Shannon, 99 Mass. 200, 202; Fuller v. Eastman, 81 Maine, 284, 287; Kelley v. Donlin, 70 Ill. 378; Hemenway v. Wood, 53 Iowa, 21. What this means will be seen a little further on. All material issues appearing of record are presumed to have been passed upon. Davis v. McCorkle, 14 Bush, 746. But the presumption should not be conclusive.

[6] Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611, 634; Murrell v. Smith, 51 Ala. 301; Coburn v. Goodall, 72

that is not generally held true,[1] as will be seen,[2] where the present suit is not upon or against[3] the very same cause of action settled in the former,[4] except so far as it relates to some *issue* actually joined and tried or to facts necessarily implied.[5] Every-

Cal. 498, 506; Trayhern *v.* Colburn, 66 Md. 277, 279; Withers *v.* Sims, 80 Va. 651, 660, 661; Ruegger *v.* Indianapolis R. Co., 103 Ill. 449; Hamilton *v.* Quimby, 46 Ill. 90; Parnell *v.* Hahn, 61 Cal. 131; Green *v.* Glynn, 71 Ind. 336; Fischli *v.* Fischli, 1 Blackf. 360; Griffin *v.* Wallace, 66 Ind. 410, 420; Tredway *v.* McDonald, 51 Iowa, 663. See Mally *v.* Mally, 52 Iowa, 654; Harris *v.* Harris, 36 Barb. 88; Thompson *v.* Myrick, 24 Minn. 4, 11; Gardner *v.* Raisbeck, 28 N. J. Eq. 71; Smith *v.* Smith, 79 N. Y. 634; Petersine *v.* Thomas, 28 Ohio St. 596; Swenson *v.* Cresop, ib. 668; Campbell *v.* Goodall, 8 Bradw. 266; Adams *v.* Adams, 25 Minn. 72, 76; Aurora City *v.* West, 7 Wall. 82.

[1] Cromwell *v.* Sac, 94 U. S. 351; Daggett *v.* Daggett, 143 Mass. 516, 521; Foye *v.* Patch, 132 Mass. 105, 110; Smith *v.* Brunswick, 80 Maine, 189, 193; Young *v.* Pritchard, 75 Maine, 513, 518; Hill *v.* Morse, 61 Maine, 541, 543; Riverside Co. *v.* Townshend, 120 Ill. 9, 18; Chicago *v.* Cameron, ib. 447, 459; Bennitt *v.* Star Mining Co., 119 Ill. 9, 14; Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Brady *v.* Pryor, 69 Ga. 691. It is not true, even in the form in which it is sometimes stated, that the judgment is conclusive of all material facts which the parties might by reasonable diligence have litigated (Henderson *v.* Henderson, 3 Hare, 100, 115; Parkes *v.* Clift, 9 Lea, 524), except so far as that proposition relates to facts within the actual and necessary issues. Cromwell *v.* Sac, 94 U. S. 351, 357. The question is not what the court *might* have decided, but what it did decide. Smith *v.* Brunswick, 80 Maine, 189, 193; Young *v.* Pritchard, 75 Maine, 513, 518; Porter *v.* Wagner, 36 Ohio St. 471; Brady *v.* Pryor, 69 Ga. 691, 697.

[2] Post, p. 175. Indeed, the court of Alabama has held that judgment in unlawful detainer is no bar to an action for damages by reason of the detainer when such damages were not claimed in the first suit. Belshaw *v.* Moses, 49 Ala. 283. But see Serrao *v.* Noel, infra. (It is no bar to ejectment clearly. Riverside Co. *v.* Townshend, 120 Ill. 9.) A general judgment upon a general count no doubt carries prima facie all demands that might have been embraced within it, upon the natural presumption that the parties probably litigated everything they could litigate in the particular action. Hungerford's Appeal, 41 Conn. 322. But this presumption may be overcome. Ibid. See Sawyer *v.* Woodbury, 7 Gray, 499; Green *v.* Weaver, 63 Ga. 302.

[3] As when it is brought to recover back money paid under a judgment.

[4] This qualifying clause must be noticed. See Cromwell *v.* Sac and the other cases cited in note 1, supra.

[5] Cromwell *v.* Sac, 94 U. S. 351; Bissell *v.* Spring Valley, 124 U. S. 225; Daggett *v.* Daggett, 143 Mass. 516, 521; Foye *v.* Patch, 132 Mass. 105, 110; Smith *v.* Brunswick, 80 Maine, 189, 193; Riverside Co. *v.* Townshend, 120 Ill. 9, 18; Campbell Printing Co. *v.* Walker, 114 N. Y. 7; Fairchild *v.* Lynch, 99 N. Y. 359; s. c. 1 Eastern Rep. 190; Pray *v.* Hegeman, 98 N. Y. 351, 358; Williams *v.* Clouse, 91 N. Car. 322, 327 (virtually qualifying Tuttle *v.* Harrill, 85 N. Car. 456, 462); Russell *v.* Place, 94 U. S. 606. The estoppel extends to everything material 'within the issues, which was expressly litigated and determined, and also to those things which, although not expressly determined, are comprehended and involved

thing within the necessary issues is determined by the judgment,[1] as e. g. in detinue for shares of stock, damages not only for the original unlawful detention but for the detention until the shares should be redelivered.[2] But the parties are not bound to litigate unnecessary questions, even though they might do so and settle the same forever,[3] and though there may be a presumption that they did so of matters pertaining to the former trial;[4] and if not bound to litigate a matter, how can one be bound by a judgment in a cause in which one does not litigate the matter?

The case of Hibshman *v.* Dulleban[5] illustrates the first part of the rule in the Duchess of Kingston's Case.[6] The plaintiff in that suit brought his action for a legacy; the defendants pleaded a release; the plaintiff replied per fraudem; and the defendants rejoined by way of estoppel that on the exhibition of the administration account by themselves, the plaintiff then excepted to the same, and alleged that the release pleaded was exhibited to the Orphans' Court as a full answer and a satisfactory bar to the exception, and that it was held a good and valid release.

in the thing expressly stated and decided, whether they were or were not actually litigated or considered.' Pray *v.* Hegeman, 98 N. Y. 351, 358, Andrews, J.; Embury *v.* Conner, 3 Comst. 522; Dunham *v.* Bower, 77 N. Y. 76. This applies to conclusions both of law and of fact. Pray *v.* Hegeman.

A judgment has of course no effect upon questions which could not be raised or determined upon the issues involved in the action. First National Bank *v.* Hastings, 22 Minn. 224; Daniels *v.* Henderson, 49 Cal. 243; Hall *v.* Levy, L. R. 10 C. P. 154. Thus, judgment at law upon a municipal bond establishes the validity of that bond between the parties in all courts; but that judgment decides nothing concerning the question whether the bond attaches to a trust provided by statute for the security of the bondholder. The bond may be good and yet not have been so issued as to bring it within the terms of the statute concerning the trust. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611. Indeed, when a court has no authority to try a question sought to be put in issue properly in another court, it is universally true that there is no estoppel. See e. g. Bosquett *v.* Crane, 51 Cal. 505.

[1] Burlen *v.* Shannon, 99 Mass. 200; Fuller *v.* Eastman, 81 Maine, 284, 287; Blodgett *v.* Dow, ib. 197, 201; Reed *v.* Douglas, 74 Iowa, 244, 247.

[2] Serrao *v.* Noel, 15 Q. B. D. 549, C. A. That proceeds upon the ground that the two items of damage constitute but one cause of action, a subject, however, beset with difficulties. See Belshaw *v.* Moses, 49 Ala. 283, supra, which seems opposed in principle to Serrao *v.* Noel. See also Brunsden *v.* Humphrey, 14 Q. B. D. 141, C. A., reversing 11 Q. B. D. 712; Mitchell *v.* Darley Colliery Co., 14 Q. B. D. 125; s. c. 11 App. Cas. 127; post, pp. 169–173, for a consideration of the subject.

[3] Post, p. 174. See Trayhern *v.* Colburn, 66 Md. 277, 282.

[4] Parnell *v.* Hahn, 61 Cal. 131.

[5] 4 Watts, 183.

[6] P. 152.

The question was finally raised by demurrer whether the validity of the release had passed in rem judicatam; and the Supreme Court of Pennsylvania held that it had not.[1]

In Carter *v.* James [2] an action of debt was brought on an indenture of mortgage, whereby the defendant covenanted to pay the plaintiff £600, with interest, on a certain day. The defendant pleaded by way of estoppel that the plaintiff had brought suit against him in a former action of debt on bond conditioned in the penal sum of £1,200 for the payment of £600 and interest, alleging it to be the same principal sum and interest as were secured to the plaintiff by a mortgage deed of even date with the bond. The present plea further stated that the defendant in the former action pleaded an usurious agreement made between the plaintiff and himself, and averred that the bond sued upon was given in pursuance of this agreement. The plaintiff traversed the allegation thus averred; whereupon issue was joined and verdict found for the defendant. The question in the present action was whether the plea was a good estoppel against the plaintiff to deny the alleged usury. The court was of opinion that it was not.[3]

[1] Mr. Chief Justice Gibson, in speaking for the court, said: 'The validity of the release was drawn into contest incidentally; and the point, being thus incidentally decided against him, can no more prejudice his title in another court than can the decision of a surrogate or register prejudice the title of an unsuccessful claimant of administration to the estate of a decedent. Again, the point was not actually, or at least necessarily, decided. The plaintiff's exceptions to the administration account were also the exceptions of Henry Dulleban's trustees; and whether the release were good or bad was a question whose decision could not supplant a decision of them on the merits. It did not supplant it; and the gratuitous determination of a point involving the question of fraud, which had no effect there, ought to have no effect here, especially to deprive the plaintiff of a trial by jury.' See Forcey's Appeal, 106 Penn. St. 508, 515.

[2] 13 Mees. & W. 137.

[3] Alderson, B. said that the usurious agreement set out in the plea in the former action went on to state that it was agreed that a bond should be given to secure this usurious interest, and that in pursuance of that agreement the bond in question was executed for the principal and interest named in it. This latter allegation alone being traversed, the only issue the jury had to try was whether the bond was given for the sum mentioned, £600. The jury found that it had been so given; and *incidentally* it was taken for granted that, if the bond was given as a security for that debt and the amount of interest alleged in the former plea, the interest so secured was usurious, according to the previous averments in the plea, which were not put in issue by the plaintiff, but admit-

In a Pennsylvania case[1] the plaintiff brought an action of trespass on the case in the nature of a writ of conspiracy, alleging that the defendant and J T, in pursuance of a fraudulent conspiracy, had secreted, assigned, and transferred to unknown persons the goods and chattels of the defendant, thereby preventing the plaintiff from having execution thereof upon a judgment which he had obtained against the defendant.[2] It was pleaded in defence that after the conspiracy and acts charged the plaintiff had sued out an attachment execution against J T (above mentioned), and therein had summoned the present defendant as garnishee; that on the trial of the issues joined in the scire facias against the garnishee the same questions were raised and tried which were now raised; and that the verdict and judgment were in favor of the garnishee. These allegations were then traversed by the plaintiff, but the defendant (the garnishee) had the verdict. To the present action the general issue was also pleaded; and upon that the jury found for the plaintiff. The court below now entered judgment for the plaintiff, and this judgment was affirmed by the Supreme Court. The ground was that the only question properly before the court on the garnishment was whether the defendant was debtor to or had in his hands by bailment any goods of J T. The issues in question were immaterial.

There is an observation by Lord Chelmsford[3] (founded apparently upon but hardly borne out by language of the court in

ted by him for the purposes of that suit, and for the purposes of that suit only. 'If, therefore,' said he, 'the plaintiff were to be deemed estopped now when the point in issue was not raised at all in the former suit, he would be deemed estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict, and the court no judgment. (a) I take it that the party is only estopped by the form of the record in that action from recovering on the bond, or disputing that any of the issues then determined by the jury were wrongfully decided; but that he is not estopped by any of the other facts which were taken in that case to be true merely for the purpose of deciding the question at issue.'

[1] Tams *v.* Lewis, 42 Penn. St. 402.

[2] As to the supposed cause of action in such cases, see 1 Bigelow, Fraud, 69.

[3] Mackintosh *v.* Smith, 4 Macq. 913, 924.

(a) Parke, B. also says that the material facts alleged by one party which are indirectly admitted by taking a traverse on some other fact are only conclusive in case the traverse is found against the party making it. Boileau *v.* Rutlin, 2 Ex. 665. And of course there is no estoppel concerning an immaterial allegation. Sweet *v.* Tuttle, 14 N. Y. 465.

the Duchess of Kingston's Case[1]) to the effect that a distinction exists between the judgments of courts of concurrent and courts of exclusive jurisdiction in respect of matters incidentally involved in a case. 'The judgments,' he says, 'of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly [i. e. directly] in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly in issue.' By 'incidentally' in this connection the Lord Chancellor appears to refer (not to immaterial issues, but) to external facts drawn into the case by the course of pleadings diverging from direct denial of an allegation, as by confession and avoidance. The intimation appears not to have been acted upon.[2]

[1] Everest & Strode, Estoppel, App. B, p. 421.

[2] The whole passage, in the language of the court in the Duchess of Kingston's Case, is as follows: 'From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the parties, upon the same matter *directly* in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming *incidentally* in question in another court, for a different purpose.'

That is a different thing from saying that a judgment of a court of exclusive jurisdiction is evidence 'whether the matter arises incidentally or is the matter directly in issue.' The facts pleaded in the second action were directly in issue — 'directly upon the point' — in both kinds of courts, according to the language of the Duchess of Kingston's Case; and then, as they were found in courts of *exclusive* jurisdiction, the finding is conclusive in a second action, though the question should there arise incidentally. The very next sentence shows this conclusively. 'But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment.' Duchess of Kingston's Case, Everest & Strode, Estoppel, 421.

The two passages are constantly quoted. Coffey *v.* United States, 111 U. S. 436, 445; Williams *v.* Williams, 63 Wis. 58, 71. As the text, however, states, no distinction appears to have become established between courts of concurrent and of exclusive jurisdiction in this respect; the only question, and it applies to both courts alike, is whether a finding upon external issues between the parties, drawn into the case by the course of the mutual allegations, and necessary to the decision of it, is binding in a cause arising directly upon such issues. That, as appears in the text, is not entirely agreed.

It may be added that by the words 'matter to be inferred by argument from the judgment,' the court clearly meant matter which was arguable, and

This suggests the question, What is to be considered the point in issue within the meaning of the law? Is the rule this, that the judgment is conclusive upon every point which by the evidence in the action became necessary to the decision of the case? Or is it this, that it is conclusive only of such matters as, being alleged by the plaintiff as the ground of his action, and controverted by the defendant, are necessary to the decision, in contrast with such matters as *in themselves alone* involved questions foreign to the cause of action, but which in the position of the case became necessary to its decision? There is much conflict of authority upon the subject. Without attempting to follow the course of the many cases upon this point, we shall venture to make the suggestion that by the weight of authority the judgment is conclusive upon all issues which have become necessary to the decision of the case, whatever their relation to the cause of action.[1]

not a certain and necessary inference from the judgment. Matter of the latter kind clearly is within a judgment. Post, p. 164.

[1] See p. 152, 'necessary facts in a chain, as well as the primary facts in issue.' Chief Justice Parker of New Hampshire has taken the opposite view. After quoting the rule from the Duchess of Kingston's Case, in the case of King *v.* Chase, 15 N. H. 9, which involved this question, he says: 'Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue in one sense. As, for instance, in an action of trespass if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no non est factum involved in the matters put in issue by the plea of nul disseisin or not guilty which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact the one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by

The recent case of Dickinson *v.* Hayes [1] illustrates the second part of the rule in the Duchess of Kingston's Case.[2] The action

the evidence it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties. This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first. It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded; and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied if the plaintiff had title. That matter is settled. The verdict and judgment may be given in evidence in another action for the oats between those parties, and is conclusive; but that is the extent of what was in issue. It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue. But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats against the same defendant, and relying upon some other title than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is that it is his title which has been tried, and he is concluded. . . . The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title; but the mortgage was not in issue. . . . Towns *v.* Nims, 5 N. H. 263. There are cases which conflict to some extent with the principle we have thus stated; some of them holding that, in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted that under such a record any particular matter came in question: while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself; provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury. Jackson *v.* Wood, 3 Wend. 27; s. c. in error, 8 Wend. 9. (*a*) While, on the one hand, we do not, with the Supreme Court [of New York, in the case just cited], deem it essential that the record should of itself show that the matter was in issue in order to make the determination of it conclusive, we are of opinion, on the other, that the general principle laid down in the Court of Errors is too broad in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence under the issue joined,

(*a*) See ante, p. 87.

[1] 31 Conn. 417.

[2] Supra, p. 152.

was ejectment for certain land, to which the defendant claimed title under the will of a minor between seventeen and twenty-

and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question, and passed upon by the jury ; as this must include all matters which came in question collaterally, by the evidence offered, if they were of such a nature as that it appears that the jury must or should have passed upon them.'

This is strong reasoning, indeed, but it is not convincing. The decision is inconsistent with the doctrine of other cases. Barrs *v.* Jackson, 1 Phill. (Eng.) 582 ; Bouchier *v.* Taylor, 4 Bro. P. C. 585 ; Thomas *v.* Ketteriche, 1 Ves. 333 (Lord Hardwicke) ; Railroad Co. *v.* Schulte, 103 U. S. 118, 143 ; Perkins *v.* Walker, 19 Vt. 144 ; Faught *v.* Faught, 98 Ind. 470 ; Burlen *v.* Shannon, 99 Mass. 200 ; Morse *v.* Elms, 131 Mass. 151 ; Attorney-Gen. *v.* Chicago R. Co., 112 Ill. 520, 539 ; Bissell *v.* Kellogg, 60 Barb. 617 ; Wood *v.* Jackson, 8 Wend. 9. Though it has lately been reaffirmed in New Hampshire. Vaughan *v.* Morrison, 55 N. H. 580, 589. See also Ford *v.* Ford, 68 Ala. 141, 143 (quoting from the Duchess of Kingston's Case the language ante, p. 157, note) ; Williams *v.* Williams, 63 Wis. 58, 71 (same quotation) ; Western M. Co. *v.* Virginia Coal Co., 10 W. Va. 250 ; Leutz *v.* Wallace, 17 Penn. St. 412. But an examination of the rule of res judicata will perhaps show the infirmity. This rule is based on the ground that there has already been a fair and full trial of the matter, which one or the other party is endeavoring to litigate again ; and the reason why there is no estoppel concerning matters not necessarily involved in the decision of the case is that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue the decision of which would determine the case. But a matter, though in itself alone foreign to the cause of action, may be made the turning-point of the case ; it then absorbs the entire case ; the ground of action is lost in it for the time ; and the whole force of evidence, examination, analysis, and argument is directed to the solution of the issue made by it. The main question in the cause, if it had distinctly arisen alone, could not have received a more thorough investigation ; and the matter itself, thus in issue, would command as careful a consideration as if it had been the main and only question in controversy. In the case of the mortgage in King *v.* Chase, supra, the validity of the instrument would be as thoroughly considered in the action of trover as if a direct action had been brought between the parties to it to cancel it. If this is true, we see no reason why the decision in the action of trover should not be conclusive upon the validity of the mortgage in all subsequent actions between the parties.

But it should be a test of the conclusiveness of the verdict upon such a matter that it clearly appear that the whole case turned exclusively upon its decision, so that it must have received as thorough an investigation as in a suit brought for the specific purpose of deciding the point ; for if it should appear that it might have been determined the same way upon other grounds also, there could then be no certainty that the decision of the point relied on as an estoppel had received a full examination, such as an estoppel is presumed to rest upon. And such a case would be presented upon a general verdict unexplained, involving several diverse issues. That we may not be misapprehended, let us take for illustration an action in

one years of age. The will had included both personal and real estate, and the probate ran thus: 'An instrument purporting to be the last will of F H, late of M, in this district, deceased, was presented in court for probate, and having been duly proved was approved and ordered to be recorded.' It was contended that this decree was conclusive evidence of the competency of the testatrix to dispose of her real estate by will; the law requiring a party to be twenty-one years of age to do so, but only requiring him to be of the age of seventeen years to make a will of personalty. But the court decided the point otherwise.[1]

ejectment, and suppose first, that the defendant relies solely upon a mortgage from the plaintiff letting him into possession, and verdict for the plaintiff; secondly, that the defendant relies both upon the mortgage and a deed from the plaintiff's ancestor, and general verdict for the defendant. In the case first put the validity of the mortgage must have received as exhaustive an examination as it was capable of; and we can see no good reason why the verdict should not be conclusive in a suit in chancery between the parties to have the mortgage cancelled as a cloud upon the plaintiff's title. But the second case is entirely different. The decision may have been put upon the ground of the validity of either the deed or the mortgage; and in a suit to cancel either or both, this verdict unexplained could not be an estoppel. The certainty upon which an estoppel must rest would be wanting.

If, however, it is once established beyond doubt by evidence of the pleadings, or other sufficient evidence, that the whole case turned upon the validity either of the mortgage or of the deed exclusively and independently, this should end the controversy forever. See Bissell v. Kellogg, 60 Barb. 617. Of course if the verdict is special, the same conclusion follows.

To conclude this note with two or three special cases, an independent cause of action, such as set-off, may be drawn into the issues and conclusively adjudicated (post, p. 174), and the case under consideration is certainly no stronger; indeed, in principle it is the same thing. Again, suppose a will to have been admitted to probate, would not the judgment be conclusive, between the heirs or devisees, of the testator's mental capacity in ejectment on a deed by the testator, in connection with evidence that his mental condition was the same all the time? Comp. Dickinson v. Hayes, 31 Conn. 417; ante, p. 159; Faught v. Faught, 98 Ind. 470 (converse case); Brigham v. Fayerweather, 140 Mass. 411, 415, 416.

[1] 'The general question,' said Mr. Justice Sanford, in delivering the judgment, 'before that court was whether the instrument was the last will and testament of Frances E. Hubbard, and as such entitled to probate. This question necessarily involved an inquiry into her testamentary capacity. If she was seventeen years of age, and was of sound and disposing mind and memory, then she was legally competent to make a will, and if the instrument in question was executed, published, and attested as the law required, it was a valid will, and it was the duty of the Court of Probate to approve, accept, and establish it accordingly. . . . The record demonstrates that the Court of Probate passed upon and found all facts necessary to uphold its judgment and justify its approval of the instrument as a will; to

A similar question arose in Dunckle *v.* Wiles.[1] That was an action of ejectment for seven acres of land, in which the defendant gave in evidence the record of a judgment in favor of his grantor against the present plaintiff, in an action of trespass quare clausum fregit, the close being a large one, and embracing the one in question. The defendant to that action, now plaintiff, pleaded that the close in question was his own soil and freehold. Issue was joined and judgment given in favor of the grantor of the present defendant. In the court below the record of this judgment was held a bar to the plaintiff's action; but on appeal the Supreme Court reversed the ruling.[2]

wit, the legal capacity and mental competency of the testatrix to make *a* will, that she had made one in fact, and in due form of law, and that it was duly attested as her will. Without all these facts found the judgment had no legal basis to stand upon. Standing on them it could not be overthrown. . . . This record says in substance that the Court of Probate found that the testamentary paper in question was the will of Frances E. Hubbard, and consequently that she had one degree at least of testamentary capacity; but whether she was found to have had both or not the record does not, with conclusive certainty, disclose. The will must therefore operate upon something, on one kind of property or on both; otherwise it would not be a will. But to concede to it the efficacy of a will in its operation upon the personal property is all that is necessary to uphold the judgment of approval by the court.'

[1] 5 Denio, 296.

[2] Beardsley, C. J. speaking for the court, said that the verdict and judgment would create an estoppel on the question of title to the entire close in question if title to that extent was shown to have been in controversy on the trial of the first suit. But no evidence out of the record had been produced to show whether the whole or a part only of the close was in question before; so that the point would have to be determined from the record. If a close was to be regarded, he said, like a horse or an ox, as entire and indivisible, it would follow that judgment on the question of title must be conclusive as to all the land of which it was constituted. Assuming this principle as correct, a plaintiff in trespass quare clausum fregit, the close having been described in the declaration and liberum tenementum pleaded, could only recover by proving a trespass coextensive territorially with the close as described. There would be no difficulty, however, in doing this, since upon the principle assumed the close was one and indivisible, so that a trespass upon any part would necessarily be a trespass upon the whole. But such, he said, was not the law. In trespass quare clausum fregit the plaintiff might recover on proof of a trespass done to a part only of the close, although he had no right whatever to the residue; and the plea of liberum tenementum would be sustained by showing that the defendant had title to the place where the alleged trespass was committed, although such place was but part of the entire close to which the plea had reference. This principle was well settled. King *v.* Dunn, 21 Wend. 253; Rich *v.* Rich, 16 Wend. 663; Stevens *v.* Whistler, 11 East, 51; Tapley *v.* Wainwright, 5 Barn. & Ad. 395. He said that it must follow that as the plaintiff in the action of trespass, of

An instructive case upon this branch of the subject was decided in 1850 by the Court of Appeals of New York.[1] It was an ejectment for a lot of land in New York City taken by the municipal corporation for widening a street. The corporation had applied to the Supreme Court, according to the statute, to appoint commissioners to examine and report upon the subject. They did so; the Supreme Court confirmed the report; the land was taken, and conveyed to parties under whom the defendants claimed. The plaintiffs desired to show that these proceedings were void on the ground that the legislature had assumed unconstitutional powers in passing the statute under which the property was taken; but the defendants inter alia contended that the plaintiffs were estopped by the adjudication of the Supreme Court confirming the report of the commissioners; that court having had jurisdiction to adjudicate between the corporation and the plaintiffs, and the question now before the court having then been put in issue and determined. It was held, however, that there was no estoppel.[2]

which evidence had been given in the present case, might have recovered without showing an injury coextensive with the whole close described in the declaration, and as the defendant might have maintained his plea by proving title to that part of the close on which the supposed trespass had been committed, it was no necessary consequence of the issue that the title to the entire close was in question. The record was therefore no bar. The judgment was undoubtedly conclusive of everything necessarily involved in the issue, or of that which, falling within its limits, had come directly in question. But the title to the entire lot had not necessarily been drawn in issue, and no extrinsic evidence had been offered to show that the title to the seven acres now in question had been directly tried. The injury complained of in the former suit might have been done to another and distinct part of the close, to which part alone the plea might have had reference. In order to render the record in that case an estoppel in this it was necessary to prove by extrinsic evidence that the title to the seven acres was directly in controversy in the former suit. To the same effect he cited the language of Lord Tenterden, C. J. in Bassett *v.* Mitchell, 2 Barn. & Ad. 99.

[1] Embury *v.* Conner, 3 Comst. 511.

[2] Mr. Justice Jewett, who delivered the judgment of the court, first observed that the Supreme Court, under the street law, exercised its powers as a *court* and not as commissioners appointed by the legislature; and that its decisions in such matters were judgments of the court, and subject to review on appeal; though in this particular it was a court of limited jurisdiction. Striker *v.* Keller, 7 Hill, 9; s. c. in error, 2 Denio, 323; 2 Cow. & H. notes, 946. He then proceeded to say that to determine the question involved by this point it became necessary to see what matters were referred to the Supreme Court in street cases for adjudication, and what were the issues between the parties; 'because,' to quote his language, 'ordinarily the parties or their privies are

A former judgment or verdict, on the other hand, is conclusive between the parties [1] to contested causes [2] (as has already been intimated) of all *necessary* inferences arising from it as well as of the matters actually in issue.[3] Thus, in the case of Perkins *v.* Walker the plaintiff brought an action of slander. The defendant gave evidence tending to prove the truth of the

only concluded by a judgment of a court upon such matters as are in issue between them in the cause or proceeding referred to it for determination.' Under the statutes there was nothing submitted to the court, he said, but the appointment of the commissioners and the confirmation of their report. This involved only the question of the fitness of the persons named as commissioners, the regularity of the proceedings of the corporation and the commissioners, and the justness of the estimate and assessment made and reported by the latter. The question whether the statute had the legal effect to transfer to the corporation the legal title of the owner of the lands proposed to be taken was not, and could not be, from the nature of the case, determined by the court. And although the statute declared that the report, when confirmed by the court, should be final and conclusive upon all persons, and that the title to the land should be vested in the city government in fee simple, still, this was by force of the statute, and not as an adjudication upon the question by the Supreme Court. The whole proceeding was but a mode adopted by the state to exercise its right of eminent domain through a power confided to the corporation of New York, or its officers. The confirmation of the proceeding under the statute could in no sense be deemed an adjudication upon the *effect* of these proceedings. The order of confirmation merely concluded the parties in respect to the regularity of the preliminary proceedings, and did not conclude either party as to their effect. And whether the statute was or was not constitutional had not been, and could not properly have been, determined by the court so as to estop the owners from making the question in the action brought for the recovery of the premises.

Further, see Eastman *v.* Symonds, 108 Mass. 567; Burlen *v.* Shannon, 99 Mass. 200; Watts *v.* Wilson, 75 Ala. 289; People *v.* Johnson, 38 N. Y. 63; Crum *v.* Boss, 48 Iowa, 433. See also Rogers *v.* Ratcliff, 3 Jones, 225, in which it was held that a verdict upon a fact put in issue by a special plea was not conclusively determined when there was, by the same verdict, a finding for the defendant upon the general issue; the reason stated being that the finding for the defendant upon the general issue fixed the fact that the plaintiff had no cause of action, and consequently it was unnecessary to investigate the matter of the special plea. See Burwell *v.* Cannaday, 3 Jones, 165.

[1] See Brigham *v.* Fayerweather, 140 Mass. 411, 413, in regard to judgments in rem.

[2] Williams *v.* Williams, 63 Wis. 58, where there was a default.

[3] Perkins *v.* Walker, 19 Vt. 144; Pray *v.* Hegeman, 98 N. Y. 351, 358; Faught *v.* Faught, 98 Ind. 470 (judgment establishing the dispositions of property under a will establishes the testator's capacity to make the will); Shinn *v.* Young, 57 Cal. 525; Brady *v.* Huff, 75 Ala. 81 (judgment for plaintiff in forcible entry and detainer establishes the plaintiff's previous possession); Norwood *v.* Kirby, 70 Ala. 397 (that such judgment establishes the relation of landlord and tenant between the parties); School District *v.* Stocker, 42 N. J. 115; Tuska *v.* O'Brien, 68 N. Y. 446.

words spoken. The plaintiff then produced the record of a judgment in his favor in an action of trover brought by the defendant against him to recover for the alleged taking and conversion of certain cloth; and it was admitted that the cloth sued for in that action was the same cloth in reference to which the words charged as slanderous were spoken by the defendant. The court held that the judgment was conclusive against the defendant both in regard to the title to the cloth and in regard to the defence alleged in justification against this action.

In an action of trespass for mesne profits[1] the plaintiff gave in evidence the record of a judgment against the defendant in an ejectment begun in 1843. The defendant showed an ejectment against the vendor of the plaintiff, begun in 1841, and a judgment followed by a habere facias possessionem executed. The court below held the defence good; but a contrary decision was given on an appeal. Mr. Justice Kennedy said that it had ever been held in actions of trespass brought for the mesne profits of premises previously recovered of the defendant in ejectment, that the judgment in ejectment was conclusive evidence of the plaintiff's title to the possession and right to receive the mesne profits from the date of the demise in the declaration.[2] And no defence could be alleged against the action for mesne profits which would have been a bar to the action of ejectment.

In the further examination of the law concerning questions embraced within the scope of the judgment we come to the consideration of special and material demands of the plaintiff connected with his former action but not passed upon in the judgment, and of counter-demands of the defendant of which he did not in that action avail himself. We do not speak of the

[1] Man *v.* Drexel, 2 Barr, 202.

[2] Kille *v.* Ege, 82 Penn. St. 102; Aslin *v.* Parkin, 2 Burr. 668; Van Alen *v.* Rogers, 1 Johns. Cas. 281; Benson *v.* Matsdorf, 2 Johns. 369; Jackson *v.* Randall, 11 Johns. 405; Emerson *v.* Thompson, 2 Pick. 473, 487. This is not true now in England. The judgment is conclusive of the right to mesne profits only from the date of the writ, a change wrought by the Common Law Procedure Act. Harris *v.* Mulkern, 1 Ex. D. 31. In some of the states the action of ejectment is considered as more than a mere possessory action, and is conclusive of title. See Payne *v.* Payne, 29 Vt. 172.

omission of *evidence* in support of demands (in such cases the judgment works a perfect estoppel against the use of such evidence afterwards, though newly discovered,[1] in support of the *same* demand[2]), but of demands themselves not in fact litigated.

In answer to an action in the King's Bench to recover the proceeds of certain bags of clover[3] the defendant pleaded an award; to which the plaintiff replied that the subject-matter of the present suit was not included in the reference; and issue was joined on the replication. The plaintiff was allowed in the court below to prove that the matter of the present action had not been laid before the arbitrators; upon which he obtained a verdict. Motion was then made by the defendant to set aside the verdict, and for a new trial, on the ground that the terms of reference, being 'all matters in difference,' were conclusive on the parties in relation to all causes of action subsisting between them prior to the submission, of which the subject-matter now in question was one. But the motion was refused, the court assigning no ground for the decision. In the court below a case was alluded to precisely similar.[4] In that case the defendant pleaded among other things that an action had been brought by the plaintiff for some other matter, in which all matters in difference had been referred; that the arbitrator ordered several sums to be paid, and that the parties should give general releases; and that the defendant did pay the money, and that the releases were given. The plaintiff replied that the present matters were not before the arbitrator, to which the defendant demurred. Lord Mansfield said that the only question was whether a submission of all matters in difference was a submission of matters *not* in difference; and judgment was given for the plaintiff.

In Webster *v.* Lee[5] the question arose whether a promissory note not due must have passed under consideration in the case of a submission of 'all demands between the parties.' The

[1] In re May, 28 Ch. D. 516. Special circumstances affecting at the time the value of an article in litigation cannot afford ground for impeaching the judgment upon a great change in its value. Roberts *v.* Rice, 71 Ala. 187.

[2] Cromwell *v.* Sac, 94 U. S. 351, 354.

[3] Ravee *v.* Farmer, 4 T. R. 146.

[4] Golightly *v.* Jellicoe, 4 T. R. 147, note.

[5] 5 Mass. 334.

court allowed the fact to be proved that the note was not laid before the arbitrator. Chief Justice Parsons said that either party might prove what demands then existed. That a promissory note was a demand for certain purposes could not be denied. Yet it might well be questioned whether a submission of all demands to arbitrators included an acknowledged debt not in controversy, concerning which debt there was no difference or dispute. If it was a fair construction of such a submission that it included all matters *in difference*, then either party might prove that a particular demand was not laid before the arbitrators, and so was not a matter in difference between the parties. Still, as either party might submit to the arbitrators all demands, the presumption was that all demands were in fact submitted; but the presumption might be disproved. Without deciding, however, that an agreement to refer 'all demands' was subject to the same construction as a submission of 'all matters in difference' the Chief Justice said that it was manifest that an agreement to refer might not be executed; and he said that evidence might be received to show the fact.

The effect of a judgment in case of a suit upon several distinct demands, some of which were dropped, may be seen in Seddon *v.* Tutop.[1] The action was for goods sold and delivered, to which there was a plea of former recovery. The plaintiff replied that he was now suing on different promises; and from the evidence it appeared that the plaintiff in the former suit had declared on a promissory note, *and for goods sold;* but on executing a writ of inquiry he gave no evidence on the count for goods sold, taking his damages for the amount of the promissory note only. It was held that the judgment was not a bar to the present suit.[2] However, it is held that

[1] 6 T. R. 607.

[2] Lord Kenyon, C. J. said: 'There cannot be two opinions respecting the justice of this case. It is admitted that the plaintiff had two demands against the defendant, the one on a promissory note, the other for goods sold; that on executing the writ of inquiry in the former action evidence was only given on the first demand; that the plaintiff recovered damages adapted to that demand; and that the other demand for the goods still remains unsatisfied. . . . The issue was whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not. The case of Markham *v.* Middleton, 2 Strange, 1259, is extremely different from the present. There the plaintiff

after judgment against an agent for the price of goods sold for his principal the agent cannot be sued again for wrongfully selling the same goods on credit.[1]

And where, to an action upon a note, the defendant pleaded a former judgment thereon, and the fact was that in the former action the plaintiff sued upon this note and another, but withdrew the note in question before judgment, it was held that the action was maintainable; though in fact the court, acting as a jury in the former suit, expressed an opinion in favor of the plaintiff on both notes.[2] In a recent case it appeared that a bill had been filed against the holder of two mortgages to redeem the first one of them, which he had foreclosed; that he had not set up the second mortgage in his answer; that the bill was successful; and that a decree had been rendered that the premises should be discharged of the mortgage named in the bill; and it was now contended for the mortgagor that the mortgagee was estopped to avail himself of the second mortgage by his failure to assert it in the former action. But the court held the contrary.[3]

A like principle is illustrated in White *v.* Moseley.[4] That

had but one demand; and though the jury gave inadequate damages for that demand on account of the plaintiff's not being prepared with proof of his whole bill, he would have been barred by that verdict if it had stood. But in this case there were two distinct demands not in the least blended together; and though the plaintiffs might in the first action have proved this demand, owing to inadvertence they did not; and the recovery on the note in that action is no bar to their demand in this, which is for goods. In truth, this is a question of great delicacy; we must take care not to tempt persons to try experiments in one action, and when they fail suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show beyond all controversy that the second is a different cause of action from the first, in which he failed. In this case it is clearly shown that the demand was not inquired into in the former action.'

[1] Caylus *v.* New York R. Co., 76 N. Y. 609.

[2] Wood *v.* Corl, 4 Met. 203. So the maker of two notes, having a common defence to each, but having failed to plead it in an action upon one of the notes, is not estopped thereby from pleading it when sued upon the other note. Hughes *v.* Alexander, 5 Duer, 488; Adams *v.* Adams, 25 Minn. 72; ante, p. 76. See Treadwell *v.* Stebbins, 6 Bosw. 538; Clark *v.* Sammons, 12 Iowa, 368; Freeman *v.* Bass, 34 Ga. 355; Maghee *v.* Collins, 27 Ind. 83; Hooker *v.* Hubbard, 102 Mass. 239. Judgment for interest on a note is no bar to a subsequent action for the principal. Morgan *v.* Rowlands, L. R. 7 Q. B. 493.

[3] Gerrish *v.* Black, 122 Mass. 76.

[4] 8 Pick. 356.

was an action of trespass quare clausum fregit for tearing down a mill-dam. The defendants pleaded a former recovery, to which the plaintiffs replied that that was in a different cause of action. Issue was joined on the replication. It was admitted that the act complained of in the former suit was the passing over the mill lot by the defendants after they had returned from the opposite side of the river, where they had torn down the dam. They contended that the trespass now sued for was one and the same, or at least a part of the same trespass, as that sued for before. The defence was overruled in the court below; and that decision was sustained on appeal. The ground taken was that the trespasses were distinct and independent. The court said that if the defendants had gone upon the mill lot in order to complete their design of destroying the dam, there would have been but one trespass; and the circumstance in such a case that they had passed over the land of a stranger (which was the fact) in going from one close to the other would have been immaterial. But the court said the object of the defendants seemed to have been to destroy the dam; and this was effected before they recrossed the stream.

It is clear from these and other cases that where a party has distinct causes of action against another, distinct in the sense that each would authorize relief by itself, he is not bound to unite them, though the causes of action exist at the same time and might be considered together.[1] But where the supposed second cause of action is what may be termed a mere increment of the first, and not independent of it, the rule is different.[2]

The case of Florence *v.* Jenings will illustrate the last point. The action was for a certain sum of money stipulated to have been given as interest, at the rate of £20 per month, in case of default in paying a certain bill of exchange. The facts were that the plaintiff discounted for the defendant a bill for £250, drawn by the latter on one D'Arcy, and accepted by him; he

[1] Stark *v.* Starr, 94 U. S. 477, 485, Field, J. See also Cromwell *v.* Sac, ib. 350; Davis *v.* Brown, ib. 423.

[2] Florence *v.* Jenings, 2 C. B. N. S. 454. See also Serrao *v.* Noel, 15 Q. B. D. 549, C. A.; Brunsden *v.* Humphrey, 14 Q. B. D. 141, reversing 11 Q. B. D. 712; Mitchell *v.* Darley Colliery Co., 14 Q. B. D. 125; s. c. 11 App. Cas. 127; Hodsall *v.* Stallebrasse, 11 Ad. & E. 305; Belshaw *v.* Moses, 49 Ala. 283; ante, p. 154.

and the defendant at the same time signing the following memorandum addressed to the plaintiff: 'Sir, In consideration of your discounting the under-mentioned bill, we do jointly and severally undertake, if the same is not wholly paid at maturity, to pay, *as interest thereon*, £20 for each month any portion of which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied.' At the foot of this memorandum was written, '£250. Jenings on D'Arcy at three months.' This bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming interest at the rate of £20 per month, according to the above-stated agreement, but declaring only upon the bill; upon which he obtained judgment. Afterwards he brought the present action for the sum of interest due, according to the memorandum. Issue was finally joined upon demurrer by the defendant; the ground of the demurrer being that as the plaintiff had recovered damages for the non-payment of the bill, and had voluntarily forborne to take judgment for the stipulated interest, he could not bring a second action for such interest. The court allowed the plaintiff interest to the date of the judgment, but denied it to him after that time.

Chief Justice Cockburn, in pronouncing judgment, said that the interest due under the contract, though constituting a distinct debt, and properly declared for in a count upon the agreement, or for interest, was only a substitute for the interest ordinarily recoverable as damages upon a bill. Therefore, when judgment had been recovered and the claim upon the bill had become res judicata (so that any further interest payable would be upon the judgment under the statute, and not upon the bill), the right to interest upon the agreement ceased. But concerning the interest which accrued prior to the judgment, the case, he said, was different. It was clear that the plaintiff had not recovered the interest now claimed; and looking at the declaration which determined the scope of the former action, the plaintiff could not have recovered such interest in that action for want of a count upon the agreement, or for interest.[1]

What may be regarded mere 'increment' of and therefore

[1] See Florence v. Drayson, 1 C. B. N. S. 584.

necessary to the cause of action is, however, a question of great difficulty, as the authorities sufficiently show. The subject of continuing or recurring damages arising from a tort or a breach of contract presents one phase of the question. With regard to such cases the rule appears to be that all damages of the kind, of a then ascertainable nature at least, are a necessary part (or an 'increment' within the rule) of the recovery.[1] Whitney *v.* Clarendon was trespass on the case to recover for loss of services sustained after Feb. 28, 1840, in consequence of injuries to the plaintiff's son by the breaking down of a bridge. The defence was that the plaintiff had obtained a judgment for similar damages sustained *before* the date named, by reason of the same injury; and the court held the judgment a bar to the present action. The ground taken (by the majority) was that the injury inflicted by the fall of the bridge was one entire cause of action, though the damage might be continuous. It was for the plaintiff to have shown his prospective damages in one action.[2] The same rule was laid down in the later case of Burritt *v.* Belfy,[3] where, however, it was said that the plaintiff should wait until all the damage was complete if he would recover for his entire loss.

In like manner it has recently been laid down by the English Court of Appeal that if judgment be obtained for the restitution alone of goods, when a claim might have been preferred for damages for the wrongful detention down to the time of the judgment of restitution, no subsequent suit for such damages can be maintained.[4] In the case cited Lord Justice Bowen said that if the plaintiff's suit had been detinue at common law, the jury could have included damages not only for the original wrongful deten-

[1] Whitney *v.* Clarendon, 18 Vt. 252; Hodsoll *v.* Stallebrasse, 11 Ad. & E. 301; Darley Colliery Co. *v.* Mitchell, 11 App. Cas. 127, overruling Lamb *v.* Walker, 3 Q. B. D. 389; Brunsden *v.* Humphrey, 14 Q. B. D. 141, 152; Serrao *v.* Noel, 15 Q. B. D. 549, 557. See Chicago R. Co. *v.* Schaffer, 123 Ill. 112, 120.

[2] Comp. Chicago R. Co. *v.* Schaffer, *supra*. The following cases were distinguished: Hambleton *v.* Veere, 2 Saund. 169; Ward *v.* Rich, 1 Ventr. 103; Brasfield *v.* Lee, 1 Ld. Raym. 329; Roberts *v.* Read, 16 East, 215. The Chief Justice thought that where prospective damages were uncertain they could be recovered only to the commencement of the action, and that another suit could be brought if needed.

[3] 47 Conn. 323.

[4] Serrao *v.* Noel, 15 Q. B. D. 549.

tion of the property, but also for the detention until it should be re-delivered; damages might have been assessed once for all. There were not two causes of action.[1]

Another phase of the same question appears where the cause of action sued upon in the second case required the happening of a new event. It is, e. g. well settled, at least in England, that every fresh subsidence of soil, in the case of the withdrawal of the lateral support of a man's land, gives rise to a fresh cause of action, though each subsidence is due to the same act.[2] The case of Leland *v.* Marsh[3] may be noticed in the same connection. To trespass for false imprisonment the defendant pleaded a recovery before a justice of the peace for the same wrong. The plaintiff replied assigning other trespasses, to which the defendant rejoined, not guilty; and issue was taken thereon. In regard to the former recovery, that was for an imprisonment on December 3, the writ being dated December 5; while the imprisonment newly assigned was from the 6th of the same month to the 10th of the next. It was a continuing imprisonment from December 30; and the defendant insisted that the whole constituted but one injury, for which the plaintiff had already recovered. But the defence was overruled. The court said that the imprisonment was the gist of the action, and that every continuation of it was a new trespass. Of the same nature, it may be added, are repetitions of slanders and libels by the same persons who started them; the whole *may* be included in one action, but that is not necessary.[4] And this is perhaps true equally of ordinary cases of recurring damages.[5]

[1] But Belshaw *v.* Moses, 49 Ala. 283, appears opposed to this. Ante, p. 154, note.

[2] Darley Colliery Co. *v.* Mitchell, 11 App. Cas. 127, overruling Lamb *v.* Walker, 3 Q. B. D. 389; Brunsden *v.* Humphrey, 14 Q. B. D. 141, 152. See Bonomi *v.* Backhouse, El. B. & E. 646; s. c. 9 H. L. Cas. 503. Comp. also as to fresh results of negligence, Chicago R. Co. *v.* Schaffer, 123 Ill. 112, 120.

[3] 16 Mass. 389.

[4] See Odgers, Slander, 271, note, 317, 320, 456 (Am. ed.); Root *v.* Lowndes, 6 Hill, 518; Frazier *v.* McCloskey, 60 N. Y. 337; Woods *v.* Pangburn, 75 N. Y. 495; Rockwell *v.* Brown, 36 N. Y. 207; Swift *v.* Dickerman, 31 Conn. 285.

[5] See Chicago R. Co. *v.* Schaffer, supra; Byrne *v.* Minneapolis Ry. Co., 38 Minn. 212; McConnel *v.* Kibbe, 29 Ill. 483; Smith *v.* Elliott, 9 Barr, 345; Standish *v.* Parker, 2 Pick. 20; s. c. 3 Pick. 288; Richardson *v.* Boston, 19 How. 263; Courtland *v.* Willis, 19 Ohio, 342. All these except the first were cases of nuisance.

Still another phase of the subject was presented in Brunsden *v.* Humphrey, just cited. The plaintiff had obtained judgment against the defendant for damage to his cab by a collision caused by the negligence of the defendant's servant. He now sued for damage done to his own person by reason of the same negligence, and was held entitled to recover.[1] The case was decided upon the ground that there were two causes of action resulting from the one act.[2]

We have, then, at least three different phases of the question of the right of a second recovery for the same wrong, in view of other damages: first, where the whole loss was inflicted at once by the defendant, but only part of it was perceived at the time of the first suit; secondly, where the loss complained of in the second action had not happened at the time of the first recovery; and thirdly, where the wrong affected both person and property of the plaintiff. In regard to the first of these cases it may still be worthy of inquiry whether a second suit in the nature of a continuation of the first should not be allowed. The doctrine that there ought to be an end of litigation when a judgment has been rendered has many qualifications founded in justice, but it is doubtful if any of them has a better claim to recognition than the case of a plaintiff who, having no ground to expect other damage, has acted as any prudent man might well have acted. If the courts cannot help such a case, the legislature may well do so; though only for the protection of one who could not expect the later loss. The second case is still stronger, and the courts have seen their way clearly. The third case is the most difficult of all, perhaps; and yet if a wrong is capable at all of producing several causes of action, as certainly is the case, it is not clear why the same causes may not be united in one person as well as divided between two or more. Besides, the nature of a right of action for injury to the plaintiff's property may be different in the particular case from that for the injury to his person. The defendant may have a

[1] Lord Coleridge, C. J. dissenting.

[2] In regard to the right to sue for damages which had not developed at the time of a former action the learned Master of the Rolls thought that the rule of res judicata was not to be commended. But see the remarks of Bowen, L. J. at p. 148, Brunsden *v.* Humphrey.

claim upon the property, — he may be tenant in common, e. g. with the plaintiff; so that to establish the claim for damage to the plaintiff's rights of property might be an entirely different thing from proving a trespass to his person.[1]

While, however, no judgment can of itself bar an independent cause of action, whether of the plaintiff or of the defendant, it should be remarked that an independent cause of action may be drawn into the pleadings and issue by the act of the party possessed of it. Thus, the defendant to an action may plead a statutory set-off, and if this be adjudicated against him upon the merits of the claim (a fortiori if it be adjudicated in his favor), he will be barred thereafter from making it the subject of an action.[2] Again, a plaintiff suing for slander or libel may, for the purpose of showing malice, offer in evidence repetitions of the same language, each of which repetitions would constitute a distinct cause of action; but by so doing and obtaining judgment he bars himself of the right to sue for any such repetition, the verdict having probably included all in one.[3]

While this is clear, there has been conflict of authority upon the question whether a cross-action can be maintained by an employer for the negligent or improper performance of services after an action by and judgment in favor of the person performing, in which the defendant omitted to rely upon such ill performance; and the same question arises in the case of the sale of goods which fail to correspond with the warranty, and in other cases.[4] Can the purchaser after suit by and judgment in favor of the vendor, in which the inferiority of the goods was not set up, maintain a cross-action for the breach of warranty? The

[1] Comp. the remarks of Pearson, J. in Houstoun *v.* Sligo, 29 Ch. D. 448, 456, 457.

[2] Eastmure *v.* Laws, 5 Bing. N. C. 444.

[3] Root *v.* Lowndes, 6 Hill, 518; Frazier *v.* McCloskey, 60 N. Y. 337. The plaintiff is deemed, in such a case, to make the defamation sued for and the repetition given in evidence one cause of action. But for this the repetition could be sued for after judgment in the other case. Odgers, Slander, 271, note, Am. ed.; Woods *v.* Pangburn, 75 N. Y. 495; Swift *v.* Dickerman, 31 Conn. 285.

[4] As in the case of a right to have a lease rectified for mistake; the mistake need not be set up in bar of an action of trespass by the lessor, based on the lease. Houstoun *v.* Sligo, 29 Ch. D. 448.

question in the form first suggested arose in the case of Gates *v.* Preston.[1] The plaintiff in that case sued a surgeon for negligent performance of professional service; and the defendant relied upon a judgment in his own favor in an action for the value of his services, in which case the defendant, now plaintiff, had confessed judgment without trial. The Court of Appeals held that the judgment was a bar. In such a case, it was said, the right of action (there being no denial thereof) was by implication admitted; and when there was, in the answer of the defendant, an express and direct admission by him of the plaintiff's right to recover, and a consent to the entry of a judgment for a certain amount, it was an admission on the record of all the facts which the plaintiff would have been bound to prove on a denial of the cause of action alleged by him in his complaint.

The court based the doctrine on decisions in White *v.* Merritt[2] and in Davis *v.* Tallcot.[3] In the first of these cases the plaintiff sued the defendants for damages for a violation of duty in the collection of a bill, and for false and fraudulent representations concerning their connection with it, whereby the plaintiff had been drawn into an unfortunate litigation. The defendants relied upon a judgment in their favor in an action by them to recover for an advance made in behalf of the very transaction in which the bill was given. In this action the plaintiff, then defendant, had been prevented from making his defence of violation of duty by the false representations of the present defendants, and had allowed judgment to go against him, and had paid the same. There was a demurrer to this defence; but the demurrer was overruled and the defence held good.[4]

[1] 41 N. Y. 113.

[2] 7 N. Y. 352.

[3] 12 N. Y. 184.

[4] Mr. Justice Welles, in delivering judgment, said: 'By the judgment it is established that it was legal and proper that the plaintiff should pay the defendants the amount of their advance with the interest and commissions, which is utterly inconsistent with the plaintiff's claim to recover it back. (*a*) No averment is to be admitted to contradict a judgment or to dispute any legitimate inference dedu-

(*a*) This, it would seem, was not the object of the present suit; the purpose, as it would seem from the reporter's statement, was to recover damages for the violation of duty in occasioning the loss of the bill, and in getting the plaintiff into a bad suit. Indeed, the learned judge himself so states the nature of the proceeding on the next page of his opinion.

The case of Davis *v.* Tallcot, above cited,[1] belongs to the second class mentioned at the beginning of the subject under consideration. It was an action for breach of contract to furnish machinery of a specified kind and quality. The defendants, as in the preceding case, relied upon a judgment in their favor in an action for the price of the machinery. In that action the present plaintiffs had at first pleaded the breach now sued for; but before the trial they withdrew the defence and confessed judgment. The court held the judgment a bar to the present action.[2]

cible therefrom. . . . To sustain this action to recover back the advance would be to open the judgment and inquire into its propriety and legality. That cannot be done collaterally.' This doctrine has been reaffirmed in Dunham *v.* Bower, 77 N. Y. 76; Blair *v.* Bartlett, 75 N. Y. 150; Bellinger *v.* Craigue, 31 Barb. 534; Collins *v.* Bennett, 46 N. Y. 490. See Schwinger *v.* Raymond, 83 N. Y. 193. In Dunham *v.* Bower it was held that judgment in favor of a carrier for freight is a bar to an action by the shipper for damages on account of destruction of the goods in transit. In Collins *v.* Bennett it was decided that after recovery for keeping a horse no action could be maintained against the keeper for using and converting the horse contrary to the agreement for keeping him. Whether the courts generally will be prepared to go this length remains to be seen.

[1] 12 N. Y. 184.

[2] Gardner, C. J. speaking for the court, observed: 'It is obvious that, by withdrawing their claim to damages, the then defendants did not waive their right to insist upon their defence. The plaintiffs notwithstanding must have established their title to the price stipulated by proof that the machinery was made within the time and in the manner called for by the agreement; and the vendees were at liberty to meet and combat these proofs by counter evidence on their part. Now, this is precisely what was done; or rather the necessity for introducing evidence to sustain the action was superseded by the admission of the then defendants in open court, "that they were indebted to the manufacturers for the causes of action mentioned in their complaint." As the cause of action and the indebtedness of the defendants were by the complaint made dependent on a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect; and the report of the referee, followed by the judgment of the court, consequently estops the parties to that suit from ever after questioning that fact in any controversy arising upon the same agreement.'

The case of Doak *v.* Wiswell, 33 Maine, 355, may also be noticed in this connection. It appeared that the plaintiff had some years before erected buildings on his wife's land. Upon her death her heir at law recovered judgment for the land in a real action against the plaintiff, and entered into possession under the judgment. The plaintiff subsequently brought the present suit against the heir to recover the value of the buildings. But the action was not sustained. Tenney, J. said it was the plaintiff's duty in the former action to defend and protect all his rights. Whether he had then set up his rights by betterment claim or otherwise did

In Massachusetts a contrary doctrine is held, at least in cases of judgment by *default*.[1] In Bodurtha *v.* Phelon an action had been brought before a justice of the peace on a note given for the price of a horse, and the defendant pleaded a breach of warranty and obtained a reduction therefor from the amount of the plaintiff's demand. The plaintiff thereupon appealed to the Common Pleas, and the defendant was there defaulted. The latter now brought an action for the breach of warranty; and the court held the former judgment no bar to the suit. Indeed, it seems that the same rule would prevail in Massachusetts in cases not of default, provided the particular counter-right of action was not put in issue.[2] It was said, however, in Bodurtha *v.* Phelon that if the judgment given by the justice of the peace had been allowed to stand, the case would have been otherwise; which is very clear.[3]

The court of New Hampshire has lately followed the above-cited decision in a like case, with the New York authorities before it.[4] The latter were distinguished on the ground that judgment had in them been given by *confession* after answer; which was an adjudication against the existence of a right of cross-action.[5]

not appear, and was of no importance. The judgment and possession were a bar to the present suit.

[1] Bodurtha *v.* Phelon, 13 Gray, 413. This is clear after what has been seen, ante, pp. 75 et seq.

[2] Hunt *v.* Brown, 146 Mass. 253, an action by the maker of notes, upon an agreement in relation to compromise of the payee's claim, after the payee had sued and recovered regardless of the agreement; the maker having pleaded a general denial and payment and then having offered judgment against himself in full, and the offer being accepted. The judgment was held no bar to the present action. Holmes, J. at p. 255 (after saying that the agreement in regard to compromise had left the notes in full force, and that the agreement was independent in character): 'A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, *fraud*, or a *breach of warranty*. Smith *v.* Palmer, 6 Cush. 513, 521; Cobb *v.* Curtiss, 8 Johns. 470. See Burnett *v.* Smith, 4 Gray, 50, 52; Davis *v.* Hedges, L. R. 6 Q. B. 687.'

[3] Burnett *v.* Smith, 4 Gray, 50.

[4] Bascom *v.* Manning, 52 N. H. 132.

[5] Quære if judgment by default *after plea* would not be in effect the same thing; and quære if judgment by confession *without* plea would even in New York bar a cross-action? Ante, pp. 73–75. Indeed, it is doubtful whether judgment by confession is as effective as judgment by default. Ante, pp. 73 et seq.

The doctrine of the New York cases has been denied in a case before the Superior Court of Cincinnati.[1] The plaintiff in that case sued the defendant, a physician and surgeon, for 'carelessly, negligently, and improperly' treating her arm; to which action the defendant pleaded a judgment in his favor before a justice of the peace in an action against the present plaintiff to recover for his services in attending the plaintiff for her arm. To that action the plaintiff, then defendant, did not appear, though duly served with notice. A demurrer was entered to the plea; and the demurrer was sustained.[2] And recent well-considered decisions of the courts of Wisconsin and of Indiana have also rejected the doctrine of the New York cases.[3]

[1] Sykes *v.* Bonner, Cin. Sup. Ct. Rep. 464. See also, as to counter-claims in Ohio, under statutes, Witte *v.* Lockwood, 39 Ohio St. 141.

[2] Mr. Justice Hagans, for the court, said: 'In looking into the justice's record it appears that the judgment against the plaintiff for the professional services of the defendant was taken by default, and on the testimony of the defendant himself only. It was certainly not necessary, in order to entitle the plaintiff in that case to recover, that he should prove that he was not guilty of any negligence in his professional treatment. It was enough to show simply that he performed the services at the defendant's request, and their value, and the fact that the amount was due. There were no pleadings and no issues. There is nothing in the record to show that the question of negligence was involved. Now, it is argued on the authority of Gates *v.* Preston, 41 N. Y. 113, and of Bellinger *v.* Craigue, 31 Barb. 534, Davis *v.* Tallcot, 12 N. Y. 184, White *v.* Merritt, 7 N. Y. 352 (which is a case exactly like the present, except that there the defendant, before the magistrate, consented in writing to a judgment), that the judgment recovered for the services before the magistrate is a direct admission on the record by the plaintiff in this case of all the facts which the plaintiff before the magistrate would have been bound to prove on a denial of the cause of action alleged there; and that the recovery by the plaintiff there was dependent on a full performance of his duties in the treatment of his patient; and that the plaintiff here is estopped from questioning that fact in any controversy on the same agreement for services. We do not see how the plaintiff in the case before the magistrate was bound to prove that he was guilty of no negligence in his treatment of the arm before he could recover for his services therein. It was enough to prove the services and their value. We are inclined to think with Judge Daniels, who dissented in Gates *v.* Preston, that the question of malpractice was not necessarily in issue before the justice. . . . The merits of this case, under the circumstances, could not necessarily be involved without an issue on the question of negligence; and so far as the record and the pleadings show, the evidence adduced before the justice was for a different purpose. The effect of that judgment cannot be extended or enlarged by argument or implication to matters, so far as the record shows, which were not actually heard and determined.' Ihmsen *v.* Ormsby, 32 Penn. St. 198; Mallett *v.* Foxcroft, 1 Story, 474; Spooner *v.* Davis, 7 Pick. 147.

[3] Resseguie *v.* Byers, 52 Wis. 650

The English courts maintain the same rule as that declared in the case just under consideration.[1] In Mondel *v.* Steel the plaintiff sued for the breach of a contract in not building a ship according to specification. The defendant pleaded that he had previously brought an action for a balance due him by the contract, to which action the now plaintiff had pleaded the same breach of contract which was the subject of the present suit; and that the jury found that there had been such a breach, and had deducted the value thereof from the amount which the then plaintiff would otherwise have been entitled to receive. The plea was held bad on demurrer on the ground that the verdict of the jury barred the plaintiff only in regard to such damages as he had then suffered, and could not bar a claim for further damages since suffered by reason of the breach of contract. The legal effect of the verdict in the former action was that the present plaintiff had obtained satisfaction of the breach of contract now sued upon to the extent of the abatement allowed on the facts then provable, and no further.

In Davis *v.* Hedges the plaintiff brought an action for the non-performance and improper performance of certain work; in bar of which the defendant relied upon a judgment in his own favor in an action for the price of the work. In that action, as in Sykes *v.* Bonner, supra, the defendant had not alleged the improper performance. The court held the action maintainable on grounds stated in the note.[2] Mr. Justice Lush,

(suit against a physician for damages on account of negligence, after judgment by default in his favor for services against the plaintiff in the second suit); Goble *v.* Dillon, 86 Ind. 327 (same sort of case). Comp. also Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316, in regard to counter-claims.

[1] Mondel *v.* Steel, 8 Mees. & W. 858; Davis *v.* Hedges, L. R. 6 Q. B. 687; Houstoun *v.* Sligo, 29 Ch. D. 448. See Caird *v.* Moss, 33 Ch. D. 22, C. A.

[2] The court, by Hannen, J. began by quoting the language of Parke, B. in Mondel *v.* Steel, just cited, which was as follows: 'Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for the breach of warranty or contract; in which action as well the difference between the price contracted for and the real value of the articles or of the work done as any consequential damage might have been recovered. . . . But after the case of Basten *v.* Butter, 7 East, 479, a different practice, which had been partially adopted before in the case of King *v.* Boston, 7 East, 481, n., began to pre-

who concurred in all except the dictum (mentioned in the note) in regard to allowing a division of the action, drew the distinction

vail, and being attended with much practical convenience has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the case, and the work, in consequence of the non-performance of the contract, in the other, were diminished in value. . . . In all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant in all of those not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.' Mr. Justice Hannen then proceeds to say that the particular point decided in Mondel *v.* Steel was that one who has fairly obtained an abatement of the price of work done, in an action against him, by reason of a breach of contract in its execution, was not precluded from suing for special damage resulting from the breach of contract. 'But,' continued the learned justice, 'it leaves undecided the question whether he was *bound* to obtain the abatement in the action in which he was a defendant, or might recover it in a cross-action. The expression of Parke, B. which was a good deal relied on in the argument, that "to the extent that he obtains, or is *capable of obtaining*, an abatement of price, he must be considered as having received satisfaction for the breach of contract," has reference to the facts of the case in which the plaintiff did claim and did obtain an abatement. It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons why he should not. It appears from the passages above cited from the judgment in Mondel *v.* Steel that the present practice of allowing the defence of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle that the statutes of set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralize it, if the defendant was not allowed an option in the matter. The hypothesis is that the plaintiff for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done; and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which the breach of warranty or breach of contract may afford a defence is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default.

clearly between the case before the court and the cases of Marriott *v.* Hampton,[1] Hamlet *v.* Richardson,[2] and Brown *v.* McKinally,[3] — cases in which the defendants had been compelled to pay money under judgments which subsequent evidence, then inaccessible, showed should never have been recovered. 'In these cases,' said he, 'the sole ground of action was the payment; and what the plaintiffs sought by the action was to undo that payment and to place themselves in statu quo. In the present case the cause of action is the breach of contract; that cause of action existed before and was independent of the payment.'[4]

The case of Houstoun *v.* Sligo[5] further fortifies the position. In that case A was sued for trespass to lands of the plaintiff B, of which A was tenant by written lease. Under the lease as it stood B was entitled to recover, and was allowed by A to do so. But the lease was executed in mistake, certain facts agreed upon having been omitted, which would have prevented A from being treated as a trespasser. It was held that A was not bound to set up the mistake and the actual facts in answer to the action, though he might in fact and in law have done so, and that he might bring a suit to have the lease rectified after the judgment

It is unreasonable therefore that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the day of payment has arrived. Surely, the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price.' The learned judge proceeds to mention another inconvenience that would result from a different rule from the one declared; to wit, that it would tend to complicate and increase litigation, from the fact that defective performance of work generally involves consequential and recurring damages by reason of the necessity of repairing the work. And he cited Mondel *v.* Steel as an express authority for a separate action in such case. The court came to the conclusion also that the better rule was that the defendant had the option to divide the cause of action and use it in diminution of damages; and that he would then be concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he might, as in the present case, claim no reduction at all; and afterwards sue for his entire cause.

[1] 7 T. R. 269.

[2] 9 Bing. 644.

[3] 2 Esp. 278.

[4] So in Caird *v.* Moss, 33 Ch. D. 22, C. A. it was explained that in Davis *v.* Hedges, supra, the respective claims were distinct causes of action.

[5] 29 Ch. D. 448.

against him for trespass. A was entitled, it was declared, to have the question of mistake decided in a separate action.[1] The case does not proceed upon any distinction between the rules of law and those of equity.

It will be noticed that in Davis *v.* Hedges, above stated, Mr. Justice Lush, as quoted, says that the present cause of action was the breach of contract, and that that cause of action existed before and was independent of the payment in question. Such a test appears to be decisive. If there is an independent cause of action to each party upon a breach of the contract by the other, neither in reason can be compelled to allege his defence of a breach in a suit by the other. Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from the fact that either party may sue the other for a breach. No suit can be maintained except upon a legal ground of action. Now, as one cause of action cannot in itself alone, when merged in judgment, carry another independent cause of action with it,[2] it is difficult to understand how a judgment for the plaintiff without plea can extinguish a counter-right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case, and in his own way;[3] to plead fraud is a permission, not a requirement. The defendant in the first action may not then be able to prove the facts which he relies upon in the second suit; and he is justified in reason in not raising an issue upon them.[4] The contrary doctrine would often work manifest injustice. A man who had by fraud obtained of another a note on demand could bring suit upon it at once, before the maker had had time to ascertain the facts, and the judgment would bar the just rights of the defendant.

[1] See Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Riverside Comp. *v.* Townshend, 120 Ill. 9, 18. Comp. Caird *v.* Moss, 33 Ch. D. 22, C. A.; Thomas *v.* Joslin, 36 Minn. 1; Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316.

[2] Statutes permitting the joinder of related causes of action do not require it. Gregory *v.* Hobbs, 93 N. Car. 1, 4, and cases cited.

[3] Hunt *v.* Brown, 146 Mass. 253, 255, Holmes, J. quoted supra, p. 177.

[4] Quoted with approval in Ressequie *v.* Byers, 52 Wis. 650, 656, and in Goble *v.* Dillon, 86 Ind. 327. See also Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316.

It has been in effect adjudged in a well-considered case[1] that the vendor of goods is not bound to set off their value in an

[1] Barker *v.* Cleveland, 19 Mich. 230. The case was an action by Cleveland against Barker to recover the price of a quantity of cranberries; as a bar to which a verdict and judgment in favor of Barker against Cleveland were pleaded in an action for breach of the contract in respect to the purchase of the cranberries. The court below found that there had been a valid contract of sale, and that the judgment interposed was not a bar. Chief Justice Cooley, in delivering judgment, began by saying that whatever fact became the subject of judicial controversy in the suit for the breach of warranty, and was relied on by the plaintiffs therein in support of their action, was necessarily comprehended within the judgment rendered, and was thereby, by legal inference, conclusively settled between the parties to the adjudication. Jennison *v.* W. Springfield, 13 Gray, 544. 'When a party,' continued the learned judge, 'declares upon a contract of warranty contained in a sale of chattels, he necessarily affirms the validity of the contract. The warranty does not stand independent of the sale, but is inseparably connected with and forms a part of it. It is only one of the stipulations in the main contract; and it can neither be alleged, or proved, or judicially found, except as a part of the sale. It is evident, therefore, that the judgment in Wayne county, in affirming the warranty, also affirmed, of necessity, the contract of sale; and that the existence and validity of that contract were therefore necessarily within the issue in that case and are now res adjudicata. To constitute the judgment in one case a bar to another action it is not essential that the object of the two suits should be the same, or that the parties should stand in the same relative position to each other. It would not be claimed by the plaintiffs in error that because they were plaintiffs in one suit and defendants in the other, therefore their judgment should not conclude them, if the point in controversy were the same in both cases. Nor is it important that in one case it was one stipulation of a contract which was sought to be enforced, while the other suit involved a different stipulation; the validity or invalidity of the contract being adjudged in the one case, it is settled for the other also. Betts *v.* Starr, 5 Conn. 550; Doty *v.* Brown, 4 N. Y. 71; Williams *v.* Fitzhugh, 44 Barb. 321; Walker *v.* Chase, 53 Maine, 258; Sawyer *v.* Woodbury, 7 Gray, 502; Birckhead *v.* Brown, 5 Sandf. 134; Castle *v.* Noyes, 14 N. Y. 329. And it is immaterial whether the point was actually litigated in the first suit or not if its determination was necessarily included in the judgment. Bellinger *v.* Craigue, 31 Barb. 537. As we understand counsel they claim that the question of the payment of the purchase price was necessarily covered by the issue in their suit upon the warranty; that the court was required to pass upon it in order to determine the amount of damages they had sustained; and that the sum of $100 actually found to have been paid was taken into account in the judgment rendered. If the plaintiffs in error are correct in these positions, then unquestionably the judgment in the case before us is erroneous. We have no doubt that had Barker and Bewick proceeded in that case upon the theory of the total rescission of the contract and recovered a judgment, such judgment must have been held conclusive. When a vendee puts an end to the contract of sale, for the failure of the vendor to perform, and brings suit for the recovery of damages, the object of the suit is to place the plaintiff, so far as the law can accomplish that result, in statu quo. It is obvious that in such a case the inquiry is of the first importance, how much has been paid on the contract,

action by the purchaser for damages by reason of the failure of the goods to correspond with the warranty; but the vendor, after judgment in such action in favor of the purchaser, may maintain an action on the contract for the price of the goods. The cases seem to be parallel. There can be no better reason why the purchaser, the first suit being by the vendor, should be required to allege the inferiority of the goods than for requiring the vendor to rely upon the contract price in a suit by the purchaser. Indeed, the excuse for omitting the defence by the purchaser is stronger in many cases than any which the vendor can present; for, as was suggested in the English case under consideration, it often happens that the purchaser is not able at the time of the vendor's suit to ascertain the real degree of

since such payment constitutes usually the first and leading item of damages. The purpose of such a suit is to recover back the sums which the plaintiff has paid out upon and in consequence of a contract the benefit of which he has lost through the non-performance by the other party. Freeman *v.* Clute, 3 Barb. 424. The issue, therefore, necessarily covers and the trial adjusts all questions of payment of the purchase price; and the vendor is forever precluded from maintaining a suit for the same or any unpaid portion thereof. But we do not understand that an inquiry concerning the amount of damages sustained by a breach of warranty necessarily involves the question of the payment of the purchase price. If the contract is a valid one, it is immaterial to the plaintiff's action in such a case whether he bought for cash or upon a credit not yet expired. The object of the suit is foreign to the question of payment. He sues to recover the difference between the actual value of the articles received on the contract and what their value would have been had they answered the warranty; and unless the vendor defends on the ground of non-payment of the purchase price the court does not concern itself with that question. The parties in such a case are at liberty to settle their controversies in one suit or by cross-action; but whether one suit is brought or two the damages are measured in the same way. If the vendee, instead of bringing a cross-action, sets up the breach of warranty by way of recoupment, the vendor is entitled to recover the purchase price; while the vendee will have awarded to him, by way of reduction, such damages as he can show he has sustained by a breach of the promise of warranty. Thornton *v.* Thompson, 4 Gratt. 121. . . . If, however, the vendee thinks proper to bring an independent suit upon the warranty, the damages of the respective parties are not measured by any different standard. If the vendee recovers in that suit, he is conclusively presumed to recover the full difference between the value of the articles delivered and their value as it would have been had they complied with the warranty. If the only issue in the case is upon the warranty, the court will not concern itself with the inquiry how much of the purchase price has been paid. Perrine *v.* Serrell, 1 Vroom, 458. And the vendee, having recovered his damages in that suit, is supposed to be fully compensated for any deficiency in the articles bought, and to be legally bound afterward to pay any balance of the purchase price without deduction or controversy.'

inferiority of the goods. The argument appears conclusive against the soundness of the New York cases, unless the distinction taken in New Hampshire between a judgment by confession[1] and one by default or on trial without alleging the defence be thought well of. In the case of White *v.* Merritt the court confused the case of an action to recover money paid under a judgment, and that of an action for breach of contract and fraudulent representations. The distinction has already been pointed out;[2] the former is a direct attempt to impeach a judgment collaterally, while the latter involves a suit on a cause of action separate from and independent of the one merged in the judgment.

There is another view of this question which leads to the same conclusion. A judgment is conclusive only in respect of matters necessarily inconsistent with it. Now, the fact of the ill performance of a contract is not inconsistent with a judgment upon the contract by the other party. Such facts usually go only to the reduction of damages; and the other party has thus a right of action.[3] If the counter-right should go further and entitle the defendant himself to damages, it might be argued with plausibility that this would be inconsistent with any right of action in the plaintiff; but that cannot appear until the defendant's proof is all in, and the verdict of the jury obtained. And hence, as it cannot be known in advance whether the right of action of the plaintiff in the first suit will be overbalanced, he cannot say that the second suit is necessarily inconsistent with the first judgment.

But the argument that to give damages in favor of the counter-right over the main demand would be inconsistent with any right of action upon the latter is aside from the case; for judgment on default is not equivalent either in principle or on authority to judgment upon an issue fought out. Judgment on default is good for the primary purpose of a judgment for a plaintiff; it gives him the right to have the sum adjudged collected; but it has

[1] See ante, p. 73.

[2] Ante, p. 181; post, p. 186.

[3] 'The action was on the [counter] contract, and if the contract was proved and the breach of it, the recovery was for the breach of the contract, and not to recover back money paid on the judgment, though that might affect the amount of the damages.' Fletcher, J. in Smith *v.* Palmer, 6 Cush. 513, 521.

not the full effect of a res judicata, because in reality it has been ex parte. There is the best authority for saying that judgment by default does not conclude defences in confession and avoidance in a different action.[1] And if the view here presented, that the cross-demand is an independent cause of action, is correct, it cannot matter that the former judgment was rendered upon an issue contested, if that issue did not embrace the cross-demand.

This, it is apprehended, is true of all cases of property cross-rights;[2] that is, all cases of the kind where each party to a transaction has a clear right of action before suit by the other.[3] Judgments in such cases cannot be necessarily inconsistent with each other. Even in the case of an action upon a contract to which fraud might have been set up, a judgment upon the contract is not necessarily inconsistent with the existence of fraud.[4] Fraud does not make a contract void, but only voidable;[5] and a person may elect to treat the contract as binding and sue for the fraud.[6] This, clearly, is not inconsistent with holding that fraud may not be a ground of *impeaching* judgments in collateral proceedings; since in the first case supposed there is no necessary impeachment of the judgment.[7] The plea of fraud in respect of a judgment will be considered hereafter.[8] But if the fraud or unskilful performance be pleaded to the first suit, it cannot afterwards be made ground of an action by the defend-

[1] Howlett *v.* Tarte, 10 C. B. N. S. 813; Cromwell *v.* Sac, 94 U. S. 351, 356; Hanham *v.* Sherman, 114 Mass. 19; ante, p. 75. And see especially ante, p. 73, of judgment confessed.

[2] In some states cross-decrees of divorce can be had; divorce granted to husband or wife being no bar to divorce to be granted to the other. Stilphen v. Houdlette, 60 Maine, 447; Stilphen *v.* Stilphen, 58 Maine, 508.

[3] See O'Connor *v.* Varney, 10 Gray, 231, per Shaw, C. J. It is of course admitted in New York that where the counter-demand amounts to an independent cause of action, it is not barred by the judgment first rendered. Brown *v.* Gallaudet, 80 N. Y. 413.

[4] Burnett *v.* Smith, 4 Gray, 50, 52; Hunt *v.* Brown, 146 Mass. 253, 255, quoted ante, p. 177. It is held that if fraud upon a seller of property was unknown to him at the time of obtaining judgment for the price, he may, notwithstanding the judgment, rescind the contract and demand return of the property. Kraus *v.* Thompson, 30 Minn. 64, judgment by default.

[5] White *v.* Garden, 10 Com. B. 927.

[6] Burnett *v.* Smith, supra.

[7] See Jackson *v.* Somerville, 13 Penn. St. 359. But see Homer *v.* Fish, 1 Pick. 435. In Melick *v.* First National Bank, 52 Iowa, 94, it was held that confession of judgment on a promissory note obtained by fraud of which the confessing party was ignorant may be set aside by him.

[8] Under Collateral Impeachment of Judgments, post.

ant, though judgment in the former trial had gone in his favor and he now claims greater damages than the sum for which he had himself been sued.[1] He must abide by his election.

These remarks have reference merely to the general proposition that the purchaser or employer is not estopped to sue for the breach of contract by his failure to allege the inferiority of the goods or the negligent performance; and the view here taken is based solely upon the ground of the absence of any verdict or decision upon the matter of the counter-demand,[2] but regardless of the question whether the judgment was rendered on default or after appearance and defence. There may be more doubt in regard to the soundness of the further doctrine of Davis *v.* Hedges,[3] that such party may also divide his action, using first the part ascertainable at the time of the plaintiff's action and subsequently suing for any further damages since ascertained. Only one suit can be maintained on one cause of action. One judgment merges all demands passed upon; and it might be argued that the defendant's cross-demand for the plaintiff's breach of contract is single, and not continuous or recurring,[4] and that the ill performance of the work or the inferiority of the goods was but one fact and ground of action, however and whenever it may have manifested itself.[5]

A careful distinction, however, must be noticed between a case where the plaintiff, suing upon several distinct demands, omits to introduce evidence in support of some of them, and thus saves the right of suing again upon such demands, and the case where he fails, intentionally or not, to produce *sufficient* evidence to sustain his action. In the latter case he will of course be barred,[6]

[1] O'Connor *v.* Varney, 10 Gray, 231; Burnett *v.* Smith, 4 Gray, 50; Sargent *v.* Fitzpatrick, 4 Gray, 511; Sawyer *v.* Woodbury, 7 Gray, 499; Howell *v.* Goodrich, 69 Ill. 556.

[2] See Haynes *v.* Ordway, 58 N. H. 167.

[3] Ante, p. 181, note.

[4] Ante, pp. 172–174.

[5] Judgment for the plaintiff in a suit for non-performance of a contract does not amount to an affirmance of the contract in such a way as to permit the other party to sue for the contract price. Butler *v.* Suffolk Glass Co., 126 Mass. 512.

[6] Clark *v.* Wiles, 54 Mich. 323; Miller *v.* Manice, 6 Hill, 114, 121; Cromwell *v.* Sac, 94 U. S. 351, 352; Shoemaker *v.* Atkins, 6 Baxter, 318. See Stark *v.* Starr, 94 U. S. 477, 485. In Miller *v.* Manice Chancellor Walworth said that the question whether a verdict and judgment for the defendant in a former action was a bar to a second suit for the same cause did not depend

just as he would be barred by failing to produce evidence in support of any single demand.[1] With reference to particular issues all relevant necessary facts are conclusively presumed to have been under consideration.[2] It matters not that the case may not have been fully entered into, if it was not withdrawn.[3]

But this statement itself must be taken with a distinction. One who brings an action upon one demand or several connected demands and attempts to support his whole case will assuredly be barred by the judgment from suing again for the *same* demand or any one or all of the connected demands; and he will find no escape from the estoppel by offering to show that other evidence existed, now for the first time at hand, which would have produced a different result.[4] But facts not produced or in issue in the first action, whether then at hand or not, may be used in another suit upon a *different* demand, though that demand be of the same nature and grow out of the same transaction as the one first sued upon.[5] A man may acquire different rights at the same time and by the same transaction, and, if his

upon the fact that the proof in the former suit was sufficient to sustain that action. 'For,' he continued, 'when the same matter was in issue and submitted to the jury in the former suit, without sufficient proof, the decision of the jury upon the matter in issue and thus submitted to them, followed by the judgment of the court upon their verdict, will be a bar to another action for the same cause or matter when the same evidence which is necessary to sustain the second suit, if it had been given in the former action, would have authorized a recovery therein. Where a general declaration embraces several causes of action, the plaintiff in a second suit may show that he offered no evidence as to one or more of those causes of action, and that the cause went to the jury upon a different part of his claim from that for which the second suit is brought. And then the judgment in the first action will be no bar to the second. But where he attempts to give evidence as to all the causes of action, and submits the question to the jury without withdrawing any part of his claim, and he fails as to the whole or a part, for want of sufficient proof, the defendant may insist upon the first judgment as a bar if the same evidence which is sufficient to sustain the second suit would have authorized a recovery in the first action in case it had been produced upon the trial thereof.' Stafford *v.* Clark, 1 Car. & P. 403; s. c. 9 J. B. Moore, 724; Ehle *v.* Bingham, 7 Barb. 494; Jones *v.* Weathersbee, 4 Strob. 50.

[1] See Lockyer *v.* Ferryman, 2 App. Cas. 519.

[2] See e. g. Lockyer *v.* Ferryman, supra; Newington *v.* Levy, L. R. 5 C. P. 607; Hall *v.* Levy, L. R. 10 C. P. 154; Cromwell *v.* Sac, supra.

[3] Dundas *v.* Waddell, 5 App. Cas. 249.

[4] Cromwell *v.* Sac, 94 U. S. 351. See In re May, 28 Ch. D. 516, in regard to newly discovered evidence.

[5] Ibid.; Davis *v.* Brown, 94 U. S. 423. See ante, pp. 152–154; Lumber Co. *v.* Buchtel, 101 U. S. 638.

title is disputed to one of them in one suit, not make use of facts which would establish his title, without being precluded thereby from availing himself of such facts in a subsequent suit of the same sort touching his title to another of those things; though it would be otherwise if the facts were put in issue in the first suit.[1]

Thus, in the recent case of Cromwell *v.* Sac, an action by an innocent holder for value of municipal bonds (irregularly issued in fact) against the maker, it was held that the fact that the plaintiff had omitted in a former action upon other bonds of the defendant, issued at the same time and under the same circumstances, to produce evidence that he was an innocent holder for value, whereby judgment went against him, would not preclude him in the present action from bringing forward such evidence in relation to the bonds now sued upon. The finding in the former case was merely to the effect that the plaintiff was not an innocent holder for value of the bonds then in litigation. That finding could not be extended beyond its necessary meaning;[2] and this, it is apprehended, is universally true.[3] And on the other hand, for the same reason, the fact that the plaintiff was found to be a holder for value of the bonds or coupons thereof in the first suit will not establish the fact that he is such a holder in the second.[4]

It is laid down that a second action cannot be maintained upon evidence once offered and rejected as inadmissible in the trial of a like action between the parties where the plaintiff has allowed the case to go to a general judgment against him, though the evidence would otherwise be admissible in the second action. In Smith *v.* Whiting,[5] the plaintiff having brought an action for

[1] McNutt *v.* Trogden, 29 W. Va. 469. The rights being different, there may be different causes of action touching them; and 'when the second cause of action between the same parties is upon a different cause of action from the first, then the judgment in the former action is conclusive only upon those issues which were actually tried and determined,' not of all those which might have been tried. Foye *v.* Patch, 132 Mass. 105, 110; Cromwell *v.* Sac, supra.

[2] See Bissell *v.* Spring Valley, 124 U. S. 225; and further, as to Cromwell *v.* Sac, see Wilson *v.* Deen, 121 U. S. 525.

[3] Stewart *v.* Lansing, 104 U. S. 505, 510.

[4] Stewart *v.* Lansing, supra.

[5] 11 Mass. 445.

money had and received, the defendant pleaded a verdict in favor of the plaintiff in a former action between the same parties for the same demand. The plaintiff replied that the count upon which he recovered before was for money laid out and expended, and did not embrace the demand now sued upon; that upon that count he endeavored to introduce in evidence a receipt for the money now claimed, but that the evidence was rejected as inadmissible upon the count for money laid out and expended without proof that the sum was paid at the defendant's request; which fact was not in evidence. The replication was demurred to, and the demurrer was sustained. The Chief Justice said that it was apparent from the pleadings that this very demand had been tried and determined; and that though the court may have erred in rejecting the evidence offered, this was no way to remedy the case. Exceptions might have been filed, or a new trial had, or a continuance; but as this was not done, and as the plaintiff had permitted a general verdict to go against him without striking out the count to which the evidence was applicable, the court must presume that the very matter now in dispute had been tried. It was true that the cases of Ravee *v.* Farmer [1] and Golightly *v.* Jellicoe [2] had established the principle that where a demand had not been submitted, it should not be barred by an award or report on a rule or submission of all demands. But in those cases *no* evidence was offered to support the demand made the subject of the second suit; while in the present case the very evidence now relied upon was offered, and an adjudication had upon it. The plaintiff should have stricken out the count in question. On the other hand, where evidence of a set-off is excluded in a suit at law and judgment given for the plaintiff, this is not an adjudication of the matter of set-off so as to prevent the party from enforcing it in chancery, though it would be otherwise if the law court had actually passed upon the merits of the set-off.[3]

Nor does it affect the case that the existence of certain material evidence was unknown at the time of the former trial; this

[1] 4 T. R. 146. [2] Ibid. in note.
[3] Hobbs *v.* Duff, 23 Cal. 598. Comp. ante, p. 59.

is only a matter of the sufficiency of evidence already spoken of.[1] That an action cannot be maintained to recover money paid under a judgment, by reason of the subsequent discovery of evidence showing that the judgment should never have been obtained, was decided as long ago as in the year 1797 in the well-known case of Marriott *v.* Hampton.[2] Though the contrary doctrine of Moses *v.* Macfarlan, just cited, has been followed in one or two cases,[3] the rule above stated in Marriott *v.* Hampton is now considered as well settled.[4] But a distinction has been made in the case of money obtained by extortion under color of legal process. In such a case it has been held that the money may be recovered.[5] The ground of the decision was thus stated by Lord Denman: 'Is or is not the money sought to be recovered the money of the plaintiff? It is. How did the defendant obtain the money? By fraud. . . . This state of things differs the case entirely from those cited.[6] In all the cases cited there was nothing to negative the bona fides.'

In the case of one who is possessed of cumulative securities for debt the holder is entitled to as many judgments as he has

[1] Supra, p. 188.

[2] 7 T. R. 269, overruling Moses *v.* Macfarlan, 2 Burr. 1005. 'I am afraid,' said Lord Kenyon, 'of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation; otherwise there would be no security for any person. I cannot, therefore, consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial, and they are as often refused; but this goes much further.' Of course no action can be maintained to recover part of a sum of money adjudged to be paid, on the ground that such part was plainly in excess of what was due. Stempel *v.* Thomas, 89 Ill. 146. Indeed, it is held that where pending suit money is paid in settlement of a disputed claim, it cannot be recovered back, though the suit result in favor of the party who paid it. Dawson *v.* Mann, 49 Iowa, 596.

[3] Lazell *v.* Miller, 15 Mass. 207; Smith *v.* McCluskey, 45 Barb. 610. The plaintiff is not estopped in an action for money had and received from collections made by the defendant, by a judgment for the defendant in a former suit upon a special contract to recover the same sum, if the only question submitted in the former action was concerning the special contract. Gage *v.* Holmes, 12 Gray, 428.

[4] Huffer *v.* Allen, L. R. 2 Ex. 14; Kirklan *v.* Brown, 4 Humph. 174; Flint *v.* Bodge, 10 Allen, 128; In re May, 28 Ch. D. 516. See Caird *v.* Moss, 33 Ch. D. 22, C. A.

[5] Cadaval *v.* Collins, 6 Nev. & M. 330; s. c. 2 Harr. & W. 54.

[6] Marriott *v.* Hampton, 7 T. R. 269; Snowdon *v.* Davis, 1 Taunt. 359; Knibbs *v.* Hall, 1 Esp. 84; Brown *v.* McKinally, ib. 279.

distinct securities; though he will not be able to claim more than one satisfaction of his debt. Such a case arose in Butler *v.* Miller.[1] That was an action of trover for property conveyed to the plaintiffs by chattel mortgage. The defence was a judgment confessed by the mortgagor to the mortgagee for the debt secured by the chattel mortgage. But it appeared in evidence that it had been agreed that the judgment should be taken as collateral to the mortgage. The court below held that if it was satisfactorily shown that the judgment was taken as collateral to the mortgage, there was no merger of the plaintiff's right of action on the latter. On appeal this ruling was affirmed; but Mr. Justice Johnson, in speaking for the court, thought that there would have been no merger even without the agreement mentioned. It would scarcely be contended, he said, that in case the notes in question had been secured by a mortgage upon real estate a judgment upon them would have extinguished the mortgage. And a mortgage upon real estate was only a security and an incumbrance upon the land; whereas a mortgage of personal property was more than a security. It was a sale of the thing mortgaged, and operated as a transfer of the whole legal title to the mortgagee, subject only to be defeated by a performance of the condition. If, then, a judgment upon the original debt would not extinguish a collateral security for its payment upon real estate, he could not see how it could divest a title to personal property acquired by purchase. Although it was clear that the notes were merged in the judgment, it did not follow that all collateral remedies were extinguished. The debt was not yet satisfied; and until that was done all collateral remedies remained. The rule that a security of a higher nature extinguished inferior securities would be found to apply only to the state of the debt itself, and meant no more than this, that when an account was settled by a note, a note changed to a bond, or a judgment taken upon either, the debt in its original or inferior condition was extinguished or swallowed up in the higher security; and that all the memoranda by which such inferior condition was evidenced lost their vitality. It had never been applied, he said, and never should be, to the extinguishment

[1] 1 Comst. 496; s. c. 1 Denio, 407.

of distinct collateral securities, whether superior or inferior in degree. These were only to be cancelled by satisfaction or voluntary surrender.[1]

In Storer *v.* Storer [2] the plaintiff as administrator de bonis non sued the defendants in debt as administrators of the person to whom the plaintiff had succeeded in administration. The defendants pleaded in bar a decree of the Court of Probate on their administration bond giving the plaintiff judgment for the very demand now sued for, but in regard to which no execution had issued. The court, however, held the action proper; the ground being that the two remedies were merely cumulative. A judgment in a suit where the action is given as a remedy merely cumulative was no bar, it was said, without satisfaction.

The case of Drake *v.* Mitchell [3] turned upon the same point. The action arose in this way: Three joint covenantors were sued for the rent of certain premises; and among other things they pleaded that one of their number had given his promissory note and bill of exchange in part satisfaction of the rent, and that this, not having been paid at maturity, was sued upon by the plaintiff and judgment obtained against the maker. The plea alleged that the note had been given for payment and in satisfaction of the debt, but did not aver that it had been so accepted; nor did it allege that the note had produced a satisfaction in point of fact. The plaintiff demurred to the plea; and the demurrer was sustained.[4]

[1] See also Butler *v.* Miller, 5 Denio, 159.

[2] 6 Mass. 390.

[3] 3 East, 251.

[4] Lord Ellenborough said: 'I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have. If, indeed, one who is indebted upon simple contract give a bond or have judgment against him upon it, the simple contract is merged in the higher security. So, one may agree to accept of a different security in satisfaction of his debt; but it is not stated here that the note and bill were accepted in satisfaction, and in themselves they cannot operate as such until the party has received the fruits of them. And then, although they were not originally given in satisfaction of the higher demand, yet, ultimately producing satisfaction, it would be a bar to

On the other hand, as follows from what has been stated on previous pages, the law will not permit a party who has recovered in one action (whether of contract or of tort) a portion of an entire demand, to make the residue of it the subject of another suit.[1] And it is immaterial whether the failure to sue

so much of the demand.' Le Blanc, J. said: 'The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment unless it produce the fruit of a judgment.' Lawrence, J.: 'The judgment recovered on the bill is in itself no satisfaction until payment be obtained upon it.'

[1] Davies *v.* New York, 73 N. Y. 250; Bancroft *v.* Winspear, 44 Barb. 209; Stark *v.* Starr, 94 U. S. 477, 485; Baird *v.* United States, 96 U. S. 430; Berringer *v.* Payne, 68 Ala. 154; Burritt *v.* Belfy, 47 Conn. 323; Marlborough *v.* Sisson, 31 Conn. 332; Pinney *v.* Barnes, 17 Conn. 420; Smith *v.* Jones, 15 Johns. 229; Willard *v.* Sperry, 16 Johns. 121; Phillips *v.* Berick, ib. 136; Miller *v.* Covert, 1 Wend. 487; Nathans *v.* Hope, 77 N. Y. 420; O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496; Guernsey *v.* Carver, 8 Wend. 492; Bendernagle *v.* Cocks, 19 Wend. 207; Fish *v.* Folley, 6 Hill, 54; Marble *v.* Keyes, 9 Gray, 221; Warren *v.* Comings, 6 Cush. 108; Stein *v.* Prairie Rose, 17 Ohio St. 471; Erwin *v.* Lynn, 16 Ohio St. 539; South Alabama R. Co. *v.* Henlein, 56 Ala. 368; Oliver *v.* Holt, 11 Ala. 574; O'Neal *v.* Brown, 21 Ala. 482. This is not true in the case of contracts for services where the employer prevents performance; the injured party being permitted to sue for his wages as they become due, from time to time, in separate actions. Thompson *v.* Wood, 1 Hilt. 93. See Goodman *v.* Pocock, 15 Q. B. 576; Planchè *v.* Colburn, 8 Bing. 14; Derby *v.* Johnson, 21 Vt. 17; Moulton *v.* Trask, 9 Met. 577; Wilhelm *v.* Caul, 2 Watts & S. 26. So, a party may make a voluntary compromise or satisfaction of his claim in the course of an action embracing only part of an entire demand, without merging the whole. O'Beirne *v.* Lloyd, 43 N. Y. 248.

This subject was considered by Mr. Justice Dewey in delivering the opinion of the court in Goodrich *v.* Yale, 8 Allen, 454. 'In what cases,' he says, 'a former judgment in a suit between the same parties shall operate as a bar to further litigation by a new action is a question of much nicety. The difficulty arises, not so much for want of certain general rules upon the subject, as from the doubt as to which class of cases the one which is the subject of inquiry belongs. A suit and judgment thereon for the same cause of action are said to be absolutely conclusive as a bar to a second action. But it is equally true that the mere fact that the plaintiff has in his former action declared for the same causes of action does not necessarily present a case where the judgment in such action shall be a bar to a subsequent suit for one of the causes set forth in the former. Thus, in Seddon *v.* Tutop, 6 T. R. 607, where the plaintiff in the former action had in different counts declared on a promissory note and for goods sold, and the defendant being defaulted the plaintiff, upon executing his writ of inquiry, gave no evidence on the count for goods sold and took his damages for the promissory note only, it was held that the judgment was no bar to his recovering in a subsequent action for the goods sold. But in that case there were two distinct demands set forth in distinct counts and not in the least blended together. It is also true, as held in the case of White *v.* Moseley, 8 Pick. 356, that where there are dis-

for the entire demand was intentional or the result of mistake.[1] An action was brought in Pennsylvania[2] for failing to accept a

tinct torts, committed consecutively, but in different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second action for the other act. On the other hand, the case of Trask *v.* Hartford and New Haven Railroad, 2 Allen, 331, strongly asserts and applies the principle that a judgment in a civil suit upon a certain alleged cause of action is conclusive upon the parties in relation to it, and that another suit for the same cause cannot be maintained for any purpose whatever. In that case the subjects of damages in the different actions were wholly distinct, the one being the loss of a shop, and the second the loss of a dwelling-house. No damages had been claimed or recovered in the first action for the loss of the house; but the loss of each was caused by the same tortious act, and one recovery for any part of the damages caused by such act was held a bar to a second action. It was said by the court in that case: "It would be unjust, as well as in violation of the fixed rule of law, to allow the plaintiff to subject the defendants to the hazard and expense of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof." The inquiry is, Under which, if either, of these classes does the present case fall? It certainly differs from the case of Seddon *v.* Tutop, 6 T. R. 607, in the fact that there the causes of action were on the face of them distinct and independent, and were sought to be enforced as such by separate counts. That case only shows that a party may omit to assess his damages on one of several distinct counts for acknowledged distinct causes of action; and if he does so, a judgment for damages upon the other causes of action will not bar a second suit for the causes of action for which no damages were assessed. . . . The case before us differs from White *v.* Moseley, 8 Pick. 356, in the fact that there the particular tort, the subject of the second action, was not embraced in the declaration, or set forth as the cause of complaint in the first action. It differs also in the fact that there the torts were committed on different localities, the one on the premises of the plaintiff, and the other not. That case came before the court under very peculiar circumstances. The plaintiff had in the trial of his former suit insisted upon his right to recover damages for the cause of action set up in the second suit; but the defendant opposing it upon the ground that the alleged trespass quare clausum did not embrace the close where the second injury was done, the court ruled that the evidence to support this claim of the plaintiff was not admissible, it being a distinct cause of action. White *v.* Moseley, 5 Pick. 230. In the trial of the second action the ruling maintaining it was based entirely upon the assumption that the acts of the defendants were separate torts, and therefore constituted more than one cause of action. The inquiry, therefore, will be whether the present case, differing as it does from Seddon *v.* Tutop in having only a single count, charging combinedly a tort by raising and then shutting down the gate of the plaintiffs, instead of two distinct counts for separate causes of action, comes within the principle there decided. The like inquiry will also arise as to the effect of the difference in the circumstances we have alluded to, in the case of White *v.* Moseley, in distinguishing that case

[1] Wickersham *v.* Whedon, 33 Mo. 561. [2] Carvill *v.* Garrigues, 5 Barr, 152.

residue of certain goods under an entire contract; and the defence was that the plaintiff had brought an action for the other

from this. If this shall be taken to have been but one cause of action, although damages might probably have been assessed for various distinct acts, then the case we have cited of Trask *v.* Hartford and New Haven Railroad, which is abundantly sustained by other authorities, would be decisive upon the point that the former judgment is a bar to this action. The case is barren of all evidence as to the nature of the grievance complained of except as shown by the record of the proceedings in the two actions. We turn, therefore, to the declaration in the first action. We find there that the tort complained of was that on divers days the defendant entered upon the real estate of the plaintiffs without right and raised the gates of their dam, and caused the water to flow down and waste their reservoir, and at times to flood their mill, and then by shutting the gate took away the water from their mill. Here the acts causing the damages are stated as a series of connected acts occurring while the defendant was a trespasser by entering without right upon the real estate of the plaintiffs, and the answers of the defendant so treated the same, denying the allegation that he had entered upon the plaintiffs' real estate without right, and denying all the acts alleged as wrongs connected with the trespass. Upon the issues thus joined that case, as appeared by the copy of the record, was referred to the assessors, "to assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court." They did subsequently report that the damages sustained by the plaintiffs in this case amounted to the sum of $125, and judgment was thereupon entered for that sum. It is now said that this judgment is not a bar to the present action because the court did not submit to the assessors this specific ground of damage, and did not direct them to assess damages for shutting down the plaintiffs' gate. This is true; but it is equally true that they did not direct the assessors to assess damages for causing the water to flow down and waste their reservoir, and at times flood their mill, all of which were alleged as injuries. The order seems to have first declared a reference of the case. Then follows an imperfect description of the alleged causes of damages. There is no apparent reason for naming one portion of the case rather than another as the subject for the assessment of damages. It was certainly not a full recital of the plaintiffs' alleged grievances. But if it were to be taken that the assessors only reported upon one of the alleged facts, it is quite clear that it was open to the plaintiffs to ask for a recommittal for that cause, and under an enlarged rule. But the plaintiffs were content to take these damages as the damages for the entire trespasses that were set forth in their declaration. But however this may be, we are of opinion that the judgment in the former action must be a bar to the present one inasmuch as the cause of action, as presented by the plaintiffs on the record, is one and the same. The grievance complained of was an illegal entry upon the plaintiffs' land, and by various acts . . . rendering their mill valueless. The particular acts causing the damage to the mill are not set forth, as connected with a separate entry, but as a series of acts all of which are combined as causing the injury to the mill. It is true that the declaration does not restrict them to the proof of a single entry; but it does connect all these acts with each and every entry. It fails to state them as separate causes of action, or to allege them to have occurred at different times.'

portion of the goods, and recovered judgment and received full satisfaction. This was held a good defence; the ground being that as the contract was entire, the plaintiff could not separate it into parts and bring an action for one part at one time and for another at another time.[1]

The case is different, it has been held, where there has been a fraudulent concealment of part of the cause of action by the defendant.[2] In the case cited the facts were that an insurance company had taken a bond from their agent for the faithful performance of his duties. Judgment having been recovered upon the bond for money unaccounted for, a scire facias was issued, assigning as a further breach that the agent had before the judgment received a further sum for which he failed to account, the receipt of which he had fraudulently concealed. Upon demurrer the court held that this concealment justified the company in not presenting the sum in the original proceeding. It would seem that this decision might also rest on the ground that the scire facias was a mere continuance of the original action, and not an independent collateral proceeding.[3]

Difficulty concerning what is an entire demand often arises; and this is particularly true with regard to cases where there are running accounts for goods sold, money lent or paid, or labor performed at different times; or where there is but one contract with stipulations for payments or acts to be done at different times.[4] With reference to this difficulty it has been laid down that the true distinction between entire and distinct demands is that the one kind arises out of one and the same act or contract, while the other kind arises out of different acts or contracts. Every trespass, conversion, or fraud gives one right

[1] Smith *v.* Jones, 15 Johns. 229; Farrington *v.* Payne, ib. 431.

[2] Johnson *v.* Provincial Ins. Co., 12 Mich. 216. But see McCaffrey *v.* Carter, 125 Mass. 330. Lord, J. at p. 330: 'The cause of action (and the plaintiff had but one cause of action) was not concealed. The plaintiff knew its existence, brought his action upon it, recovered judgment, and that judgment was satisfied. The fraud was in preventing the plaintiff from proving in that case the full extent of his damages.' But can such fraud be beyond remedy?

[3] Eldred *v.* Hazlett, 38 Penn. St. 16. 'The revival of the original judgment [by scire facias] is but a continuation of it.' Ibid. at p. 32. Post, p. 295.

[4] Burritt *v.* Belfy, 47 Conn. 323.

of action and one only, however numerous the items of damage. So, every agreement express or implied affords one and but one action. Nor is the case of a contract containing several stipulations an exception, for each stipulation is in the nature of a distinct agreement.[1] And a contract to do several things at different times is by the better opinion a divisible contract, allowing separate judgments.[2] So it is said that when the part of a contract to be performed by the one party consists of several distinct and separate items, and the price to be paid by the other is set against each item to be performed, or left to be inferred by law, the contract will generally be treated as severable.[3] But it is not enough that goods bought are bought by weight or measure, a price being fixed to the pound, yard, or bushel, to entitle the vendor to bring more than one action.[4]

Remittent or even constant and continuous tort obviously stands upon a different footing; an action may, as we have seen, be maintained for a continuance of the wrong after a former judgment as well as for any other distinct offence not already barred by judgment.[5] Such is not a case of continuing damage flowing from one and the same tort; it is a new tort.

[1] Secor *v.* Sturgis, 16 N. Y. 548; Burritt *v.* Belfy, 47 Conn. 323.

[2] Burritt *v.* Belfy, supra; Woods *v.* Russell, 5 Barn. & Ald. 942; Denny *v.* Williams, 5 Allen, 1, 4; Knight *v.* New England Worsted Co., 2 Cush. 271; Perry *v.* Harrington, 2 Met. 368; Badger *v.* Titcomb, 15 Pick. 409, denying Guernsey *v.* Carver, 8 Wend. 492, which holds that a running contract for goods sold at different times if all are unpaid for is an entire demand and not severable. This last decision is reaffirmed in Bendernagle *v.* Cocks, 19 Wend. 207. See also Bancroft *v.* Winspear, 44 Barb. 209; Andrews *v.* Durant, 1 Kern. 35; Campbell Printing Co. *v.* Walker, 114 N. Y. 7. The case of Colvin *v.* Corwin, 15 Wend. 557, holding that purchase by the defendant of lottery tickets at two different times and places from two different agents of the plaintiff constituted but one entire demand, is overruled by Secor *v.* Sturgis, 16 N. Y. 548, and Guernsey *v.* Carver, somewhat modified. See Burritt *v.* Belfy, supra.

[3] 2 Parsons, Contracts, 517; citing especially Johnson *v.* Johnson, 3 Bos. & P. 162; Mayfield *v.* Wadsley, 3 Barn. & C. 357; Robinson *v.* Green, 8 Met. 159; and generally Mayor *v.* Pyne, 3 Bing. 285; Perkins *v.* Hart, 11 Wheat. 237, 251; Withers *v.* Reynolds, 2 Barn. & Ald. 882; Sickels *v.* Patterson, 14 Wend. 257; McKnight *v.* Dunlop, 4 Barb. 36, 47; Snook *v.* Fries, 19 Barb. 313; Carleton *v.* Woods, 28 N. H. 290; Robinson *v.* Snyder, 25 Penn. St. 203.

[4] 2 Parsons, Contracts, 519; Clark *v.* Baker, 5 Met. 452.

[5] Ante, pp. 169–174; Kilheffer *v.* Herr, 17 Serg. & R. 319; Smith *v.* Elliott, 9 Barr, 345; both cases being actions for continuance of a nuisance, after a judgment in damages for an earlier stage of the same.

The plaintiff in a judgment by default cannot prevent the defendant from bringing suit by volunteering his case and allowing him a partial credit for a separate claim.[1] In the case cited the plaintiff sued for goods sold and delivered; the defence was that the goods had been credited by the present defendant in an account annexed to a writ sued by him against the present plaintiff before the commencement of this action, in which former suit judgment had been rendered by default. The plaintiff desired to prove in the court below that the amount thus credited was not equal to the value of the goods; but the court refused to hear the evidence, on the ground that the former judgment was conclusive of the value of the goods. The case was appealed and the judgment reversed. Mr. Justice Wilde, referring to the argument that the evidence offered would tend to impeach the former judgment, said that the maxim 'judicium semper pro veritate accipitur' did not apply. The defendant in the former suit was not bound to avail himself of the plaintiff's admission or confession of payment. He was not bound to prove the value of the goods at his own expense, when by bringing suit for them the expense would be thrown upon the opposite party. Such a rule as the present defendant contended for would often be productive of injustice. He then added this illustration: 'Suppose a case of mutual demands between A and B, A's demand against B being $20, and B's demand against A $30. If A sues B, and credits B's demand of $30 at only $15, how upon the principles advanced by the defendant's counsel can B recover his balance of A? He can recover no balance in A's suit; and if judgment in that suit is conclusive, he can have no remedy.' And he added that, though the party might file his account and claim a set-off, still the statute did not compel him to do so.

Entries lawfully made of record after judgment, and having relation thereto, have a like conclusive effect with the record of the judgment itself. Thus, when a purchaser under judicial sale obtains an extension of time for payment and has the same duly

[1] Minor v. Walter, 17 Mass. 237.

entered of record, he will be concluded against alleging payment as having been made at the time of such entry.[1]

We have elsewhere remarked that the estoppel is not to be evaded by changing the form of action from that employed in the first suit.[2] In Slade's Case it was resolved by all the justices and barons of England, 'after many conferences,' in the language of Lord Coke, that the plaintiff in that action on the case in assumpsit should recover not only damages for the special loss which he might have sustained, but also for the whole debt, 'so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so vice versa a recovery or bar in an action of debt is a good bar in an action on the case on assumpsit.'

But a judgment in trover for the *defendant* is no bar to an action for money had and received by the defendant for the plaintiff's use in respect of the same matter for which the action of trover was brought.[3] And this shows that the form of action may in some instances be changed where the cause of action remains substantially the same, without the fear of a plea in bar. The circumstances under which this may be done would seem to be where it cannot be certainly known that the verdict and judgment in the former action were based upon matters which would negative those alleged in the subsequent suit. But the mere change of the form of action, where it is certain that the former judgment negatives the claim or matter alleged in the second action, will have no effect, and a plea of the former trial will be an absolute bar to a new suit;[4] otherwise the doctrine of res judicata would be a mere delusion.

It is in accordance with the principle in the foregoing cases that where a party has presented a claim before a court of jus-

[1] Haralson v. George, 56 Ala. 295.

[2] Ante, p. 86; Slade's Case, 4 Coke, 92 b, 94 b; Stowell v. Chamberlain, 60 N. Y. 272; Taylor v. Castle, 42 Cal. 367; Ware v. Percival, 61 Maine, 391; Hatch v. Coddington, 32 Maine, 92; Hardin v. Palmerlee, 28 Minn. 450.

[3] Hitchin v. Campbell, 3 Wils. 240; Buckland v. Johnson, 15 C. B. 145; s. c. 26 Eng. L. & E. 328.

[4] Routledge v. Hislop, 2 El. & E. 549.

tice, and judgment has been pronounced against its validity, he cannot escape the effect of the adjudication by filing the same matter in set-off in a subsequent action against him by the defendant.[1] So, where a defendant has pleaded a matter in set-off which has been adjudicated against him, he cannot afterwards, as we have seen, make it the subject of an action.[2]

Nor will it change the effect of a former judgment that another matter has been added to the ground of complaint, if the original ground is presented also;[3] parol evidence being admissible, if necessary, to show what was decided in the former suit.[4] In the case first cited a former suit for judicial separation had been dismissed, in which the ground of complaint alleged was cruelty. In order to avoid the effect of the decree the petitioner now added a charge of adultery to that of cruelty, and prayed for a dissolution of the bonds of matrimony. But the court held the former decree a bar against the charge of cruelty.

It is a general principle too that a party or privy cannot relitigate in a collateral action in chancery a matter adjudicated in a court of law.[5] The point has been frequently so decided.[6] The case first cited was this in brief: The defendant's testator had bought land at sheriff's sale under an execution at law against the complainant's grantor. Subsequently to the levy on the land the defendant in the original suit at law had conveyed it to the complainant. The executors of the purchaser at the execution sale being about to dispose of the land, the complainant sought to restrain the sale in chancery and compel the executors to convey to him; the ground being that the levy on the land and the sale were unauthorized. The suit was dismissed. The court said it was possible that the plaintiffs in the

[1] Jones *v.* Richardson, 5 Met. 247.

[2] Eastmure *v.* Laws, 5 Bing. N. C. 444; ante, p. 174.

[3] Finney *v.* Finney, L. R. 1 P. & D. 483; Wilson *v.* Deen, 121 U. S. 525.

[4] Wilson *v.* Deen, supra. See ante, p. 87.

[5] So e converso. Clark *v.* Wiles, 54 Mich. 323; ante, p. 99.

[6] Hendrickson *v.* Norcross, 4 C. E. Green, 417; Baldwin *v.* McCrea, 38 Ga. 650; Broda *v.* Greenwald, 66 Ala. 538 (judgment on an account stated between parties, followed by an attempt in equity to surcharge and falsify); Strang *v.* Moog, 72 Ala. 460; Wetumpka *v.* Wetumpka Wharf Co., 68 Ala. 611; Alabama Warehouse Co. *v.* Jones, 62 Ala. 550; Mayor *v.* Lord, 9 Wall. 409; Tilson *v.* Davis, 32 Gratt. 92, 104.

suit at law were not entitled to a levy on the land; but the defendant, the complainant's grantor, was duly served with notice in that action, and having allowed judgment to go against the land, he could not now disturb the sale in this collateral way.

Judgment at law has, however, no effect in equity in regard to matters relating to the same cause, if cognizable only in a court of equity.[1] Thus, judgment at law against the validity of an instrument as a deed, for want of delivery, will not shut off resort to equity to enforce it as a contract to convey.[2] So, if there be equitable defences to an action at law which were not available there, such as part performance to an action of ejectment,[3] or if facts existed of which a party was prevented from availing himself by fraud, or by accident unmixed with negligence on his part, he will be entitled to have any judgment rendered against him at law enjoined;[4] if, on the other hand, the defence in question could by the exercise of reasonable diligence have been made at law, no injunction will be granted.[5]

Finally, judgments do not affect after-acquired rights; the right must have been in existence so as to have been drawn in issue at the time of the suit.[6] But that, of course, is not saying that parties not then in existence may not be bound.

§ 4. *Collateral Impeachment of Judgments.*

Having completed the consideration of the first three divisions of domestic judgments, we come now to the fourth, in which it

[1] Jenkins *v.* Harrison, 66 Ala. 345; Yarborough *v.* Avant, ib. 526; Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611; Parker *v.* Judges, 12 Wheat. 561; Burn *v.* Carvalho, 4 Mylne & C. 690.

[2] Jenkins *v.* Harrison, 66 Ala. 345.

[3] Yarborough *v.* Avant, 66 Ala. 526. See Pendleton *v.* Dalton, 92 N. Car. 185 (dismissal of bill for specific performance no bar to recovery of money paid on contract of purchase); Beere *v.* Fleming, 13 Ir. C. L. 506; ante, p. 59.

[4] Embrey *v.* Palmer, 107 U. S. 3, 11; Hendrickson *v.* Hinckley, 17 How. 443; Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332; Pearce *v.* Olney, 20 Conn. 544; Dobson *v.* Pearce, 12 N. Y. 156. But an issue of fraud tried at law is conclusive in equity. Wilkins *v.* Judge, 14 Ala. 135. See Strang *v.* Moog, 72 Ala. 460.

[5] Embrey *v.* Palmer, supra; Phosphate Sewage Co. *v.* Malleson, 4 App. Cas. 801, 814; Dundas *v.* Waddell, 5 App. Cas. 249.

[6] Wisconsin *v.* Torinus, 28 Minn. 175. 180; Newington *v.* Levy, L. R. 7 C. P. 180; ante, p. 79, in regard to partition.

is intended to show under what circumstances and in what particulars a domestic judgment is liable to impeachment in a collateral action; an action, that is to say, not begun for the purpose of annulling or enjoining the execution of the judgment.[1] We have already seen that strangers may impeach judgments in collateral actions; we are now to ascertain if parties, or those who might have been parties, ever have the like privilege. The only grounds upon which a judgment can be impeached in a collateral action are, want of jurisdiction and fraud. First, then, of contesting the jurisdiction.

In the case of judgments of the superior courts parties who have had an opportunity to be heard (and such only[2]), and their privies,[3] are, in general, according to most of the authorities, held estopped in collateral actions to deny the jurisdiction of the court in which the former judgment was recovered, unless it appear from the face of the record that the court had not acquired jurisdiction.[4] That is, in such cases there is a conclu-

[1] A suit to recover back money paid under a judgment is of course a collateral proceeding. See cases ante, p. 181.

[2] McCoy *v.* McCoy, 29 W. Va. 794, 807; Haymond *v.* Camden, 22 W. Va. 182; Stevens *v.* Brown, 24 W. Va. 236; Underwood *v.* McVeigh, 23 Gratt. 409.

[3] Who are meant by parties and privies has been seen ante, pp. 114, 115 (parties), 142–144 (privies). Strangers, not interested legally in the cause at the time of the former trial, cannot impeach the judgment, in the absence of fraud upon them. Wilcher *v.* Robertson, 78 Va. 602, non-resident. See ante, p. 48.

[4] Plume *v.* Howard Inst., 46 N. J. 211; Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Washington Ins. Co., 35 N. H. 162; Wingate *v.* Haywood, 40 N. H. 437; Wandling *v.* Straw, 25 W. Va. 692; Penobscot R. Co. *v.* Weeks, 52 Maine, 456; Mercier *v.* Chace, 9 Allen, 242; Lantz *v.* Maffett, 102 Ind. 23; Wiley *v.* Pratt, 23 Ind. 628; Coit *v.* Haven, 30 Conn. 190, and cases cited; Pardon *v.* Dwire, 23 Ill. 572; Clark *v.* Bryan, 16 Md. 171; Callen *v.* Ellison, 13 Ohio St. 446; Kennedy *v.* Georgia Bank, 8 How. 586; McCormick *v.* Sullivant, 10 Wheat. 192, holding the same to be true of the United States courts, as not being courts of inferior jurisdiction.

Contra, in New York. Ferguson *v.* Crawford, 70 N. Y. 253. And in principle this appears to be right. A decision is a judgment *if* the court had jurisdiction, otherwise not. Hence the jurisdiction ought always to be open to inquiry. This result has been reached with regard to judgments rendered in a sister state. Thompson *v.* Whitman, 18 Wall. 457. See chapter 6. An attorney of record, who represented the plaintiff by bringing suit and taking judgment for him, cannot urge on his own behalf as a creditor the invalidity of such judgment for want of process. Kennedy *v.* Redwine, 59 Ga. 327. See Jones *v.* Hawkins, 60 Ga. 52, 56; King *v.* Penn, 43 Ohio St. 57. But that is not estoppel by record. Consent cannot give jurisdiction, but an admission or a statement of facts may; which when acted upon will work an estoppel. Rail-

sive presumption that the steps required of the plaintiff to obtain jurisdiction over *residents*[1] were taken; as, for instance, that due service or publication was made, or appearance entered. But there is authority for the position that the presumption is not conclusive, if the plaintiff has brought suit against one personally who is under legal disability; though there is conflict on the point. The weight of authority appears to be that (while such party cannot deny service, publication, or appearance) he or she may show the *disability* in a collateral action, at least if the former judgment was by default.[2]

The presumption of jurisdiction just mentioned prevails, however, only in regard to judgments of the superior courts[3] in proceedings carried on according to the course of the common law. In the case of proceedings not according to the common law, at least in regard to jurisdiction, a different doctrine is generally held to prevail. It was laid down, however, in a California case,[4] that if the record of such a court averred nothing indicating a want of jurisdiction, the same presumption would arise as in proceedings in accordance with the common law. But that case has been overruled;[5] and, indeed, the weight of authority is clearly the other way,[6] unless there is ground for a distinc-

way Co. *v.* Ramsey, 22 Wall. 322, 327; Thornton *v.* Baker, 15 R. I. 553, 555.

[1] There is no such presumption in regard to non-resident defendants. Thompson *v.* Whitman, 18 Wall. 457. See next chapter.

It must be remembered that citizens and residents of the state are bound by its laws in regard to modes of acquiring jurisdiction. See In re Union R. Co., 112 N. Y. 61; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Rousillon *v.* Rousillon, 14 Ch. D. 351.

[2] Griffith *v.* Clarke, 18 Md. 457; Moore *v.* Toppan, 3 Gray, 411; Whitney *v.* Porter, 23 Ill. 445; Graham *v.* Long, 65 Penn. St. 383. Contra, Hortman *v.* Osgood, 54 Penn. St. 120; Simmons *v.* McKay, 5 Bush, 25; Blake *v.* Douglass, 27 Ind. 416. This point is considered ante, pp. 116–118.

[3] See Mulligan *v.* Smith, 59 Cal. 206, 233.

[4] Hahn *v.* Kelly, 34 Cal. 391.

[5] Belcher *v.* Chambers, 53 Cal. 635.

[6] Galpin *v.* Page, 18 Wall. 350; Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Washington Ins. Co., 35 N. H. 162; Embury *v.* Conner, 3 Comst. 511; Huntington *v.* Charlotte, 15 Vt. 46; Clark *v.* Bryan, 16 Md. 171; Bumstead *v.* Read, 31 Barb. 661; Arthur *v.* State, 22 Ala. 61; Harris *v.* Hardeman, 14 How. 334. But see Tibbs *v.* Allen, 27 Ill. 119. It was there adjudged, in an appeal instead of in a collateral action, that the absence of an affidavit of the non-residence of the defendants from the record was not sufficient ground for reversal; the proceeding being one of notice by publication. So Falkner *v.* Guild, 10 Wis. 563, also a case of statutory proceedings, but involved in a collateral action. Paine, J. speaking for the court, said: 'The general rule in respect to such courts [superior courts] is,

tion based upon the fact that the general powers of the court, and not merely its mode of acquiring jurisdiction, are limited. But it is very doubtful if any such distinction can be properly made; for the court is still presided over by men skilled in the law, and its proceedings are still had with deliberation and solemnity. Indeed, it has been laid down as well settled that the judgments of courts of superior jurisdiction, while acting within statutory limits, are open to examination where all things necessary to the jurisdiction do not appear on the record; and that everything which does not distinctly appear by the record to be within the jurisdiction will be presumed to be without it.[1]

In the case, then, of inferior courts, and (according to the weight of authority) of superior courts when acting under limited powers, or not proceeding in the matter of obtaining jurisdiction according to the course of the common law, the jurisdiction may be collaterally impeached in case all the facts necessary to give jurisdiction are not spread upon the record.[2] And the English Court of Admiralty is an inferior court in this respect.[3] But the federal courts of the United States do not belong to this

at all events where jurisdiction appears, that though the record does not show everything necessary to regularity, it is to be presumed unless the contrary expressly appears. And even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. It is true that proceedings under special statutes have sometimes been made an exception to this general rule as to presumption, even in courts of general jurisdiction. But without entering into the inextricable labyrinth of cases on the subject we will only say that we can see upon principle no reason for the distinction. The general presumption in favor of the regularity of the proceedings of such courts is founded on the character of the court itself. And that character is the same whether it act under a special statute or under the common law. I cannot see that a difference in the source of its authority to act can make any rational distinction as to the presumption in favor of the regularity of its action.' See also Langworthy *v.* Baker, 23 Ill. 484.

[1] Carleton *v.* Washington Ins. Co., 35 N. H. 162, 167; Morse *v.* Presby, 25 N. H. 299, 302, and cases cited. Comp. Commonwealth *v.* Blood, 97 Mass. 538; Croswell, Executors, §§ 13–26.

[2] Rowley *v.* Howard, 23 Cal. 401; Clark *v.* Bryan, 16 Md. 171; Simons *v.* De Bare, 4 Bosw. 547; Steen *v.* Steen, 25 Miss. 513; Gray *v.* McNeal, 12 Ga. 424; Crawford *v.* Howard, 30 Maine, 422; Lewis *v.* Allred, 57 Ala. 628; Todd *v.* Flournoy, 56 Ala. 99, 112; Jones *v.* Ritter, ib. 270, 280. It appears to be *necessary* in Alabama for the record to show that the inferior court had jurisdiction. See the cases just cited.

[3] Harris *v.* Willis, 15 C. B. 709. In this case it was held that a plea of a judgment in admiralty, 'after due proceedings had,' and 'in due form of law,' was insufficient to show that the court had jurisdiction.

class.[1] If all the facts necessary to give the court jurisdiction are spread upon the record, these may perhaps be taken to be conclusive in the courts of the same state.[2] In all cases, on the other hand, where the record taken together shows affirmatively that the court had not jurisdiction of the cause, that is, where the record contains express averments respecting jurisdictional facts which show that in law jurisdiction was not acquired, the judgment is null and void.[3] And this is true, though the party impeaching the judgment for want of jurisdiction be the one who instituted the proceedings alleged to be void.[4] But when the original proceedings were properly commenced, and jurisdiction obtained by the attachment of property in the hands of a trustee (garnishee), a *defect* in the notice that should subsequently be given to the principal defendant is not such an irregularity as will render the judgment a nullity, though the defect may be sufficient cause for reversal in a court of error.[5]

But the rule that the jurisdiction of inferior courts is open to inquiry is perhaps subject to the following qualification: If the inferior court has, on general appearance of the parties, passed upon the jurisdictional facts and found them sufficient, and the record is consistent with the finding, the parties and their privies have by some courts, but not by all, been deemed estopped in collateral actions in the same state[6] to litigate the matter again.[7]

[1] McCormick *v.* Sullivant, 10 Wheat. 192; Wandling *v.* Straw, 25 W. Va. 692.

[2] Secombe *v.* Railroad Co., 23 Wall. 108. But recitals of jurisdiction are at best only prima facie evidence in any case in New York. Ferguson *v.* Crawford, 70 N. Y. 253.

[3] Penobscot R. Co. *v.* Weeks, 52 Maine, 456; Parish *v.* Parish, 32 Ga. 653; Mayo *v.* Ah Loy, 32 Cal. 477; Mercier *v.* Chace, 9 Allen, 242; Bruce *v.* Cloutman, 45 N. H. 37; Gay *v.* Smith, 38 N. H. 171.

[4] Mercier *v.* Chace, 9 Allen, 242.

[5] Carleton *v.* Washington Ins. Co., 35 N. H. 162, explained in Bruce *v.* Cloutman, 45 N. H. 37.

[6] But as to non-residents it is extremely doubtful whether any adjudication of jurisdiction would be binding upon foreign courts. See Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaslight Co., 19 Wall. 58; Hanley *v.* Donoghue, 116 U. S. 1, 3; showing that recitals of jurisdiction are not binding in other states. Non-residents, not interested at the time of the judgment, cannot impeach it. Wilcher *v.* Robertson, 78 Va. 602.

[7] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* New York, ib. 434; McFeely *v.* Scott, 128 Mass. 16 (statute as to jurisdiction of Probate Court; but before the statute the rule was different, as appears from this case and from Jochumsen *v.* Suffolk Bank, 3 Allen, 87); Montgomery *v.* Wasem, 115 Ind. 343, 347; Muncey *v.* Joest, 74 Ind. 409, 412; Porter *v.* Porter, 29 N. Y. 106; Shawhan *v.* Loffer, 24 Iowa, 217; Bonsall *v.*

And if the parties reside within the jurisdiction of the court, it is thought to make no difference whether they were personally served with process or appeared, so long as the steps required by the statute for obtaining jurisdiction were taken. This was directly decided by the Court of Appeals of New York in both of the cases cited. In Sheldon *v.* Wright the question arose in respect of the jurisdiction of a surrogate under publication of an order for persons interested to show cause against the sale of certain property. The surrogate had decided that the publication was regular; and his judgment appeared on the record of the proceedings.[1]

Isett, 14 Iowa, 309; Segee *v.* Thomas, 3 Blatchf. 11; Hungerford *v.* Cushing, 8 Wis. 324; Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556; Bolton *v.* Brewster, 32 Barb. 389; Kipp *v.* Fullerton, 4 Minn. 473; Galena & C. R. Co. *v.* Pound, 22 Ill. 399. But see Goudy *v.* Hall, 30 Ill. 109, holding that such adjudication is prima facie evidence, a case referred to in Secrist *v.* Green, 3 Wall. 744, as declaring the law of Illinois. See Croswell, Executors, §§ 13–26. An adjudication of the question who are parties to a suit binds all who were duly served with process. Anderson *v.* Wilson, 100 Ind. 402, 407.

[1] Mr. Justice Foot, in delivering judgment, said that the case differed in one particular from that of Dyckman *v.* New York, just cited. In that case, a summary proceeding, Dyckman had appeared and litigated the merits of the question; while in the present case the appellant had not appeared. 'The question then arises,' said he, 'does his omission to appear place him in a more favorable condition for litigating the jurisdictional fact; or, in other words, can a party to a judicial proceeding, by lying by and omitting to appear, acquire a right to open the proceeding at any time, and litigate in a collateral action a jurisdictional fact? It will be perceived at once that if the right depends on appearance or non-appearance, the fact that the party claiming it has been served with personal or statutory notice makes no difference. If there is any difference, it is in favor of him who has been served with personal notice; for such a notice is, in general, more difficult to prove after a considerable lapse of time than a notice by publication. . . . It cannot be, therefore, that the acknowledgment or denial of the right of a party to a summary or other judicial proceeding to disregard the record of it and litigate collaterally a jurisdictional fact depends on his appearance or non-appearance.' He then proceeded to state that the surrogate's decision upon the regularity of the publication conclusively determined the question of jurisdiction. Referring to the language upon the question of jurisdiction used in the cases of Borden *v.* Fitch, 15 Johns. 121, 141, Mills *v.* Martin, 19 Johns. 7, 33, and Latham *v.* Edgerton, 9 Cowen, 227, 229, that 'the want of jurisdiction is a matter that always may be set up against a judgment,' he said that the judges only intended to say that the want of jurisdiction might always be set up against a judgment when that fact appeared on the record, or was presented in some other unexceptionable manner. The principle in Borden *v.* Fitch was opposed by no case within his knowledge, and it was simply this; that when a form or mode of notice of a judicial proceeding is prescribed by statute, and the party resides *within the territorial jurisdiction* of the state and court, a notice in the mode

In the case of Porter *v.* Purdy,[1] in which the same point was considered, there had not in point of fact been an adjudication. The proceedings in the case sought to be impeached were had under the statute authorizing the appointment of a certain number of freeholders to assess the expense of a certain improvement. One of the persons so appointed was not a freeholder; and it was contended that the proceedings were therefore void by reason of a want of jurisdiction. But the court held otherwise. The principle to be applied was this: When in special proceedings in courts or before officers of limited jurisdiction they are required to ascertain a particular fact, or to appoint persons to act having particular qualifications or occupying some peculiar relations to the parties or the subject-matter, such acts when done are in the nature of adjudications, which if erroneous must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be.[2] It was, indeed, sometimes said that entertaining cognizance of a cause is a conclusive finding of the facts constituting jurisdiction;[3] but this might be doubted; and it was not such an adjudication as was here intended.

In case of appearance by attorney the question has arisen whether the parties are estopped to deny the attorney's authority. The question was recently brought before the Supreme Court of Indiana.[4] The plaintiffs in the case cited brought an action to have certain conveyances set aside, which had been made by virtue of a judgment against them in favor of the present defendants. They alleged that no notice had been given them of the former proceedings, and that certain attorneys had appeared and filed an answer for them without their knowledge or authority; and the court allowed them to disprove the au-

designated is sufficient to give the court jurisdiction. These were the facts in this case, but he refused to place his opinion on this ground, as that would recognize the right of the party to institute an inquiry respecting the jurisdictional fact. He rested his opinion 'solely on the conclusiveness of the judgment of the surrogate.'

[1] 29 N. Y. 106.

[2] See also Van Steenbergh *v.* Bigelow, 3 Wend. 42. Comp. proceedings on municipal bonds, post.

[3] Cox *v.* Thomas, 9 Gratt. 323; Clary *v.* Hoggland, 6 Cal. 685; Washington Bridge Co. *v.* Stewart, 3 How. 413.

[4] Wiley *v.* Pratt, 23 Ind. 628.

thority.[1] But it was laid down that where a judgment is recovered in a court of general jurisdiction against a defendant, and the record shows that an attorney of the court appeared for the defendant and filed an answer, the jurisdiction of the court cannot be controverted, unless it be by proof of fraud or that the defendant was not a citizen of the state nor during the pendency of the proceedings within the jurisdiction of the court in which the judgment was rendered, and neither had been notified of the pendency of the suit nor had given authority to the attorney to enter an appearance for him.[2]

Our inquiry in regard to fraud involves three questions: (1) whether, apart from statute,[3] a judgment may be *collaterally* impeached on the ground that it was obtained by fraud, and if it may be, then (2) what is meant by 'fraud' within the rule, and (3) under what circumstances the impeachment is allowed.[4] The early case of Meadows *v.* Duchess of Kingston,[5] a proceeding in equity to avoid the probate of a will, presented the question of the conclusiveness of a sentence in a suit for jactitation of marriage involving the marriage in question in the more celebrated case of the Duchess of Kingston.[6] In the case first referred to the sister and heir of the Duke of Kingston brought an action in chancery against the Duchess of Kingston, praying that a will made by the duke might be declared void by reason of fraud and imposition on the part of his pretended wife the duchess. The will had given her all his property under the description of his

[1] To the same effect, Wright *v.* Andrews, 130 Mass. 149.

[2] But see Wandling *v.* Straw, 25 W. Va. 692, taking a position difficult to understand. The rule has been determined as stated in the text, in regard to judgments of the sister states. Shelton *v.* Tiffin, 6 How. 163; Sherrard *v.* Nevius, 2 Ind. 241; Bodurtha *v.* Goodrich, 3 Gray, 508. See also White *v.* Jones, 38 Ill. 159; Baker *v.* Stonebraker, 34 Mo. 172; Finneran *v.* Leonard, 7 Allen, 54; Watson *v.* Hopkins, 27 Texas, 637; Brown *v.* Nichols, 42 N. Y. 26. But see Warren *v.* Lusk, 16 Mo. 102.

[3] Statute sometimes provides for cases of fraud touching judgments, as, e. g. adjudications of bankruptcy. See U. S. bankruptcy statute of 1867, c. 176, § 34; Burpee *v.* Sparhawk, 108 Mass. 111.

[4] The distinction between the right to impeach a judgment collaterally on the ground of fraud and the right to impeach it directly by a proceeding in equity to enjoin its enforcement or to annul it appears to lie mainly in the answer to be given to the third of these questions. As to such direct impeachment see 1 Bigelow, Law of Fraud, 86-94.

[5] Amb. 756.

[6] 20 How. St. Tr. 358.

wife. The fraud and imposition alleged were that the defendant had deceived the duke before their marriage into the belief that she was single, whereas she was declared at that time and still to be the lawful wife of one Hervey. The bill then charged that the relation of 'wife' was an essential consideration of the gift expressing the cause of the bequest; and it was insisted that the cause and motive, by reason of the imposition, did not exist, and that therefore the bequest could not take effect. An account was prayed, and the defendant sought to be held a trustee for the plaintiff. The plea alleged a suit for jactitation of marriage against Hervey, and stated that upon a fair trial, with cross-allegations by Hervey insisting that she was his wife, the court declared that she was a spinster, and free from all matrimonial alliance, 'so far as appeared,' with the said Hervey. The imposition was then denied generally. As against this judgment the plaintiff contended that it was not conclusive; that the words 'as far as it appears' showed that it was not definitive, and therefore not conclusive; also that it might be avoided at the hearing by evidence of fraud and collusion. But the court decided the other way.[1]

[1] Apsly, Ch. said: 'By "conclusive" I understand that the court will not receive evidence to contradict it. I lay it down as a general rule that wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment shall be received as conclusive evidence of the matter so determined. . . . Noell *v.* Wells, Lev. 235, the court would not receive evidence to prove that the will was forged, in contradiction to the probate. All the cases cited import the same rule. Temporal courts must take notice of the forms of sentence in ecclesiastical courts. . . . The only exception to the rule is where the sentence is not ex directo, according to the distinction in Blackham's Case, 1 Salk. 290. In the case of Robins *v.* Crutchley, 2 Wils. 122, the sentence was not ex directo; here the question was direct, "married or not." It was said that fraud in obtaining the sentence might be given in evidence. In Barnesley *v.* Powell, Amb. 102, Lord Hardwicke took a distinction between fraud upon the testator, and fraud after his death. "In the former case," he said, "this court would not meddle." . . . Fraud upon a court in obtaining judgment or sentence can only be examined by the court where the fraud was committed, or another court having concurrent jurisdiction in questions of marriage.' On a subsequent day the chancellor mentioned another case (Rex *v.* Vincent, 1 Strange, 481) upon the subject. It was a case of an indictment for forging a will; and on the trial the forgery was proved. But on the defendant's producing a probate of it, that was held to be conclusive evidence in support of the will. He also referred to another case, Prudam *v.* Philips, 2 Strange, 961, note, in which a question of marriage arose. The defendant gave in evidence her marriage with M; and the plaintiff showed a

It will be observed that the complainant in this case had to face two judgments, one the general probate of the will and the other the specific decree that the lady in question was a spinster when she married the Duke of Kingston. The probate of the will was equally with the specific decree a decision against the alleged fraud. Now, decrees of probate stand in a sense upon special grounds. By reason of the exclusive jurisdiction of the Court of Probate the probate of a will, and doubtless the refusal of probate, in this country as in England have always been beyond the reach of the Court of Chancery. That court has no power to set aside or disregard a lawful decree of the Court of Probate, even for fraud.[1] In other words, a decree of the Court of Probate in a matter over which it has jurisdiction cannot be impeached either collaterally or (except by the same court) directly. This is now quite generally true of the decrees of that court, whether relating to wills of personalty or of realty, though the rule was different formerly, and may still be different in some of the states;[2] and independent of statutory modification the powers of a surrogate, or of a judge in an Orphans' Court, or of an ordinary, or of any other judge sitting in the like capacity, as well as of a judge in a Court of Probate eo nomine, are the same as those of the English ordinary in the Ecclesiastical Court in regard to the wills and estates of testators and of intestates. Their decrees are to be received as conclusive; under, of course, the same limitations which prevailed in England while the Ecclesiastical Court had jurisdiction of such matters.[3]

sentence annulling the same, which was relied on as conclusive. And so it was agreed, as the report in Ambler states, unless the defendant might be permitted to show fraud in obtaining it. But Willes, C. J. after much debate took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to allege fraud, and the case of one who, like the defendant, was a party to the proceedings. Such a person could not prove that the judgment had been fraudulently obtained.

[1] Allen *v.* Macpherson, 1 H. L. Cas. 191 (affirming 1 Phill. 133, and reversing 5 Beav. 469); Hindson *v.* Weatherill, 5 De G. M. & G. 301; Jones *v.* Gregory, 2 De G. J. & S. 83.

[2] The issue devisavit vel non in cases of real estate, it need hardly be said, was formerly always sent to a court of law; the English Ecclesiastical Court having no jurisdiction over wills of realty. The same is still true of this issue, in some of the States.

[3] See upon this subject Broderick's Will, 21 Wall. 503; Crosland *v.* Mur-

The reader must, however, be careful in drawing conclusions from this doctrine. Equity will not, indeed, set aside nor will it restrain for fraud the probate of a will;[1] still, if fraud be proved, it will lend no active assistance to the party who practised it. Further, equity may, according to the real intention of the testator, declare a trust upon the will, though the same be not contained in the testament, in at least three cases: first, in the case of a shocking fraud upon a legatee or devisee, as if the draftsman should insert his own name instead of that of the legatee or devisee; secondly, where the words imply a trust for the relatives, as in the case of a specific devise to the executors without a disposition of the residue; thirdly, in the case of a legatee or devisee who had promised the testator to stand as trustee for another of part of the estate.[2] And further, Lord Hardwicke has said that while fraud in obtaining a gift under a will can be inquired into only in the Ecclesiastical Court, still, fraud in procuring the *probate* of a will in that court (as where the consent of the next of kin, wholly or partly disinherited by the will, to the probate thereof has been obtained by fraud,[3] as distinguished from fraud practised upon the testator) might be made the subject of relief in equity.[4] And this distinction has been adopted by other judges, among them by the chancellor in the case above mentioned of Meadows *v.* Duchess of Kingston.[5] It is said also that where the fraud does not go to the validity of the whole will, but only to that of some particular

dock, 4 McCord, 217; Bogardus *v.* Clark, 1 Edw. 266–270; s. c. 4 Paige, 623; Harrison *v.* Rowan, 3 Wash. C. C. 580, 582; Den *v.* Ayres, 1 Green, Ch. 153; Darby *v.* Mayer, 10 Wheat. 465, 469; Donaldson *v.* Winter, 1 Miller (La.), 137, 144; Lewis *v.* Lewis, 5 Miller (La.), 387, 393; Dubois *v.* Dubois, 6 Cowen, 494; Clark *v.* Fisher, 1 Paige, 176; McDowell *v.* Peyton, 2 Desaus. 313; Allen *v.* Macpherson, 1 H. L. Cas. 191; Hindson *v.* Weatherill, 5 De G. M. & G. 301; 1 Jarman, Wills, 26, note 2, Bigelow's ed.

[1] Broderick's Case, 21 Wall. 503; Ellis *v.* Davis, 109 U. S. 485, 494; Wolcott *v.* Wolcott, 140 Mass. 194; Trexlor *v.* Miller, 6 Ired. Eq. 248; Allen *v.* Macpherson, 1 H. L. Cas. 191; Meluish *v.* Milton, 3 Ch. D. 27.

[2] Marriot *v.* Marriot, Gilb. 203, 209; Allen *v.* Macpherson, 1 H. L. Cas. 191; s. c. 1 Phill. 133.

[3] 1 Story, Equity, § 440.

[4] Barnesley *v.* Powell, 1 Ves. Sr. 284.

[5] Kennell *v.* Abbott, 4 Ves. 802. See Allen *v.* Macpherson, supra. The fraud alluded to by Lord Hardwicke, it should be observed, is not fraud upon the court in the concoction of a decree. That kind of fraud, he said, could only be examined by the court in which it was committed.

clause, equity will interpose in favor of the party thereby wronged;[1] but this may deserve some qualification. It has also been held, it may be added, that a will which has been fraudulently destroyed or suppressed may be established in equity.[2] But beyond cases of this kind, over which the Court of Probate could afford no adequate relief, the jurisdiction of that court is in proper cases exclusive and its decrees beyond examination.

The question of the right of impeaching a judgment on the ground that it was obtained by fraud, to pass on from the special view of judgments of the Court of Probate, was directly before the court in the Duchess of Kingston's Case. Lord Chief Justice De Grey, in pronouncing the opinion of the court, in language which has long been classic, said: 'In civil suits all *strangers* may falsify for covin, either fines or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral security, or other advantageous pleas.'[3]

There are many cases which support this doctrine;[4] though

[1] 1 Story, Equity, § 440.

[2] Buchanan *v.* Matlock, 8 Humph. 390; Tupper *v.* Phipps, 3 Atk. 360. Contra, Myers *v.* O'Hanlon, 13 Rich. 196.

[3] 'In criminal proceedings,' he continued, 'if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser whose conveyance would be affected as it stands; and even after a conviction by verdict he may traverse the time. In the proceedings of the Ecclesiastical Court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it. In the modern cases the question seems to have been whether the *parties* should be permitted to prove collusion, and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger and tried by a jury, and determined by the court of temporal jurisdiction.'

[4] Perry *v.* Meddowcroft, 10 Beav. 122; Meddowcroft *v.* Huguenin, 4 Moore, P. C. C. 386; Bandon *v.* Becher, 3 Clark & F. 479. By a recent English statute (23 & 24 Vict. ch. 144, § 7) it is provided that *any* person may intervene in a divorce case,

it is to be remembered that the fraud must be practised against the *stranger*, he having at the time some legal interest in the cause.[1] The case first cited was a suit in chancery, and came before the court upon exceptions to the master's report. The question was how far a sentence of the Ecclesiastical Court of nullity of marriage was binding in chancery on a child of the alleged marriage, who was en ventre sa mère at the time of the sentence. The facts in substance were that a marriage which had been solemnized between A and B was declared void by the Ecclesiastical Court. Some time afterwards a child of A and B, en ventre sa mère at the time of the sentence, and who could not therefore have been a party to the proceedings, claimed property as descendant of A. He attempted to impeach the sentence for fraud; but the court held that the matters alleged were insufficient to constitute fraud. The opinion, however, was expressed that the complainant was not estopped to prove fraud if he could.

Whether *parties* may set up fraud has been a subject of conflicting opinion.[2] In a recent case[3] the complainants in a bill in equity sought to prove collaterally that a certain judgment had been obtained by fraud, and although it did not seem to be doubted that this could be done, no question was raised on the point, and no decision of it made. The court only held the evidence insufficient to constitute fraud.[4] It is, however, said in the course of the opinion that 'while a judgment is conclusive upon parties and privies and cannot be impeached, still in equity it may be vacated and set aside where it has been procured by collusion.' But this language refers, of course, to a direct and not to a collateral proceeding.

In Great Falls Manufg. Co. *v.* Worster[5] the defendants were allowed to impeach a judgment for costs obtained by the plaintiffs; but they were sureties, and not parties to the former

before the decree is made absolute. See Bowen *v.* Bowen, 3 Swab. & T. 530.

[1] Ante, pp. 150, 151.

[2] The fraud in any case, even for the purpose of annulling a judgment, must be actual positive fraud, — 'malus animus. Patch *v.* Ward, L. R. 3 Ch. 203. See Payne *v.* O'Shea, 84 Mo. 129.

[3] Field *v.* Flanders, 40 Ill. 470.

[4] See People *v.* Phœnix Bank, 7 Bosw. 20; People *v.* Townsend, 37 Barb. 520; Fisk *v.* Miller, 20 Tex. 579; Carr *v.* Miner, 42 Ill. 179.

[5] 45 N. H. 110.

action. The court says there is no doubt that a judgment may be collaterally impeached by a third person not party or privy to it, upon the ground of collusion with intent to defraud him. This case is, therefore, merely in accord with the English cases above presented.[1]

In Edgell *v.* Sigerson[2] the court plainly states that if the judgment there relied on as an estoppel were obtained by fraud, it was void; but this was a dictum. The question actually before the court was whether in pleading under the new practice, to avoid the estoppel of a judgment, it was sufficient to allege that it was obtained by fraud without stating the facts constituting the fraud. Counsel did not deny that fraud was a proper ground of impeachment; the question went by default.

In the case of Jackson *v.* Summerville[3] the judgment was founded on a forged deed; and the question was whether it could be impeached on this ground. The court admitted that a judgment rendered by a court of competent jurisdiction, upon the point in issue, could not be overturned in a collateral proceeding; but said there never had been a judgment whether the deed was obtained by fraud. 'That decree,' it was said, 'was rendered upon the faith of the fact that the Summervilles were legally and honestly represented by Jackson. But if the deed were fraudulent and void, the title never passed out of the Summervilles, but still resides in their legal representatives. While, therefore, the decree is good as against the interest honestly represented before the court, it is void as against the interests not represented at all; that is, not represented in the eye of the law. . . . As to that interest the decree of the court was, as it were, coram non judice.'[4]

In at least two American cases, however, it has been directly decided that a judgment may be collaterally attacked because it was obtained by fraud.[5] There have been dicta to the same

[1] To the same effect Mitchell *v.* Kintzer, 5 Barr, 216; Callahan *v.* Griswold, 9 Mo. 775; Atkinson *v.* Allen, 12 Vt. 619; De Armond *v.* Adams, 25 Ind. 455.

[2] 20 Mo. 494.

[3] 13 Penn. St. 359.

[4] See Otterson *v.* Middleton, 102 Penn. St. 78, 88.

[5] Hall *v.* Hamlin, 2 Watts, 354; State *v.* Little, 1 N. H. 257. See also Hunt *v.* Blackburn, 128 U. S. 464, where the fraud alleged was not proved.

effect in other cases not already cited.[1] But there have also been decisions to the contrary.[2] The point was raised in a recent case in the Supreme Court of Iowa.[3] The offer to prove that the judgment had been procured by fraud was rejected in the court below; exceptions were taken, and the ruling was sustained on appeal. The court said: 'If a judgment can be attacked for fraud in any case, it can only be by a direct proceeding.'[4] And in a late case in Tennessee the same doctrine was held even in regard to a judgment rendered by a justice of the peace.[5] The attempt there was to rectify a judgment obtained by fraud, by bringing a new action for the same cause; but the court held the former judgment a bar. Nor, where this view prevails, will the attempt to rely upon fraud be more successful in equity than at law when the judgment is not attacked by a direct proceeding to set aside or to enjoin or otherwise annul it.[6]

It is clear, however, by our authorities as well as by those of England, as we have seen, that the plea of fraud in obtaining the judgment relied upon by the opposite party is good, generally speaking,[7] in favor of third persons whose rights have been affected by the judgment.[8] This is certainly true of the case of creditors and others seeking to impeach a judgment for fraud upon themselves.[9] Between the parties to the former judgment

[1] See Smith *v.* Keen, 26 Maine, 411; Thouvenin *v.* Rodriques, 24 Texas, 468; Hartman *v.* Ogborn, 54 Penn. St. 120.

[2] Anderson *v.* Anderson, 8 Ohio, 108; Boston & W. R. Co. *v.* Sparhawk, 1 Allen, 448; McRae *v.* Mattoon, 13 Pick. 53; Christmas *v.* Russell, 5 Wall. 290; Kelley *v.* Mize, 3 Sneed, 59; Kirby *v.* Fitzgerald, 31 N. Y. 417; Hammond *v.* Wilder, 25 Vt. 342, 346; Smith *v.* Smith, 22 Iowa, 516. But concerning judgments rendered in foreign lands, see Cammell *v.* Sewell, 3 Hurl. & N. 617. And see the chapters on Foreign Judgments.

[3] Smith *v.* Smith, supra.

[4] Mason *v.* Messenger, 17 Iowa, 261.

[5] Kelley *v.* Mize, supra. See also Van Doren *v.* Horton, 1 Dutch. 205.

[6] Boston & W. R. Co. *v.* Sparhawk, supra.

[7] Upon the limits to this doctrine see ante, pp. 150, 151.

[8] See, besides the cases above cited, Gaines *v.* Relf, 12 How. 472; Hall *v.* Hamlin, 2 Watts, 354; Dougherty's Estate, 9 Watts & S. 189; Thompson's Appeal, 57 Penn. St. 175; ante, pp. 150, 151.

[9] In Thompson's Appeal, supra, the court says: 'Where a collusive judgment comes into collision with the interests of creditors, they may avoid the effect of it by showing it to be a nullity *as to themselves*, and in doing so they do not impair its obligation between the original parties upon whom it is undoubtedly binding; a fraudulent judgment, like a fraudulent deed, being

it is not easy, on authority merely, to determine what should be the rule of law. The language of the House of Lords in Bandon *v.* Becher [1] appears, however, to suggest the true answer, though the contest there was between third persons. In this case the court says that 'a sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument [where there was any at all], a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit.' That appears to mean that such a 'judgment' would be absolutely void.

This brings us to the second question, the meaning of the term 'fraud' in the general inquiry. False or perjured evidence clearly does not satisfy it; there may be a real cause, a real issue, a real trial, and therefore a real judgment, notwithstanding such evidence.[2] Indeed, the fact that conspiracy is added, and that the demand itself is a sham, cannot help the matter, according to the better view.[3] No decision would be safe if a judgment

good against all but the interests intended to be defrauded by it. But they cannot call upon the court to vacate it on the record, which would annul it as to the whole world.' It follows, of course, that if the judgment creditors cannot vacate the judgment, they cannot collaterally impeach it merely because it was a fraud upon the debtor. To enable them to do so it must have been a fraud upon themselves; and this proposition the learned judge so states in his opinion. See also Lewis *v.* Rogers, 16 Penn. St. 18: 'Creditors can attack a judgment collaterally only for collusion.' Gibson, C. J.

[1] 3 Clark & F. 479.

[2] Engstrom *v.* Sherburne, 137 Mass. 162; Greene *v.* Greene, 2 Gray, 361 (see Edson *v.* Edson, 108 Mass. 590, 597, 598); Homer *v.* Fish, 1 Pick. 435; Graham *v.* Boston R. Co. 118 U. S. 161; Peck *v.* Woodbridge, 3 Day, 30; Gilston *v.* Codwise, 1 Johns. Ch. 195; Flower *v.* Lloyd, 10 Ch. D. 327, C. A. (a foreign judgment; but see as to such a case Abouloff *v.* Oppenheimer, 10 Q. B. D. 295, C. A.). False swearing as to *jurisdictional* facts, such as residence, is a different thing, and, in the absence of statute to the contrary, may ordinarily be shown in a collateral action. See McFeely *v.* Scott, 128 Mass. 18, 20. But as to adjudications upon such matters, see ante, p. 206.

[3] Engstrom *v.* Sherburne, supra; Graham *v.* Boston R. Co., supra; Castrique *v.* Behrens, 3 El. & B. 709; post, p. 254, note. Contra, Spencer *v.* Vigneaux, 20 Cal. 442, it seems. The judgment was by default as to the one innocent defendant, against whom the others conspired. Still, the plea was the plainest impeachment of the judgment. It did not confess and avoid it, as in Howlett *v.* Tarte, 10 C. B. N. S. 813, infra. See ante, p. 75.

If a fraud at all, the false swearing

could be attacked on such grounds, in a collateral proceeding, while the judgment is still in force.[1] The case of Engstrom *v.* Sherburne was an action by one of several defendants, who had appeared and answered to an action resulting in judgment against him (by default) and them; the plaintiff alleging that the other parties to the former suit had conspired together successfully to obtain the judgment and have his property sold thereunder upon a sham demand. It was held that the action could not be maintained.

Indeed, the rule, accurately stated, so far as there is such a rule, appears to be that a judgment *obtained* by fraud may be impeached, not that a judgment may be impeached *for* fraud;[2] and the true question is of the meaning of the term 'fraud' within that rule. In another work[3] the author has sought to show that fraud means 'endeavor to alter rights by deception touching motives or by circumvention not touching motives.' The first-named wrong in the definition, 'deception,' implies some transaction, like an agreement, between the wrongdoer and the party wronged; the second, 'circumvention,' some transaction between the wrongdoer and a third person, as in the case of a conveyance by a debtor in fraud of his creditors. Where the wrongdoing consists only in bringing forward false evidence, or where there is only an overreaching, there is no fraud within the definition or within the authorities. But where there is any agreement at the trial between the parties, tainted with misrepresentation scienter, or other fraud in the way of deception against the rights in law of the party complaining of the judg-

and conspiracy are a fraud upon the State; there is no fraud upon any right of the innocent party, — he has no 'right,' 'jus,' in the legal sense, to require truthful evidence from the other side. Fraud, to come within the notice of the law, must be upon a legal right. See 1 Bigelow, Law of Fraud, 13.

[1] Newly discovered evidence of that kind might be ground for a new trial or for a proceeding to annul the judgment; but clearly it should be more difficult to impeach a judgment in a collateral proceeding, which still leaves it in force, than in a direct proceeding to destroy it. And that is the meaning of the authorities.

[2] That is, to repeat the text in another way, the distinction is between a sham demand or cause of action, upon which a judgment has been obtained in the ordinary way, and a demand established by fraud in the very course of the trial. Judgment in the first case is binding until impeached in some direct proceeding to avoid it, otherwise a judgment could be impeached for false evidence.

[3] 1 Bigelow, Law of Fraud, pp. 4–7; 2 ib. pp. 3, 18.

ment,[1] or where there is any similar transaction at the trial between the other parties to the cause, in the way of 'circumvention,' against such rights, there, it is apprehended, is fraud such as *may* justify an impeachment of the judgment collaterally even upon the footing that the judgment is only voidable. In this position will be found the case of a judgment 'concocted' (to use a common term) in fraud at the trial, a judgment entered against one's rights through the treachery of one's counsel known to the other side,[2] a judgment taken after a valid compromise of the cause, or after payment of the demand, and a collusive judgment.[3]

In regard to the third question proposed, the circumstances under which impeachment collaterally is to be allowed, it is to be said that so far as the question is an open one, and it may be in some states, it may well be doubted whether judgment, while it may still be made the subject of a proceeding to destroy it, should be collaterally impeachable on grounds of fraud not touching the jurisdiction of the court.[4] If the time for proceeding against it has passed, without fault of the injured party, that, and that only, should make a different case.[5] So, if a case arise such as that referred to in Bandon *v.* Becher, in which the judgment is no judgment at all because of fraud, the fact may doubtlessly be shown in any collateral proceeding at any time.

Judgments of inferior courts may no doubt be impeached for fraud of the kind sufficient in cases of judgment of a superior court, at all events in cases where no appeal lies,[6] and possibly in other cases.[7]

[1] As to what is meant here by 'rights,' see note, p. 218.

[2] See Hunt *v.* Blackburn, 128 U. S. 464, where the alleged misconduct of counsel was not proved.

[3] Hence the significance of cases relating to decrees of divorce, in which it is said that fraud is not enough to avoid them; *collusion* must be shown. Meddowcroft *v.* Huguenin, 4 Moore, P. C. 386. See Perry *v.* Meddowcroft, 10 Beav. 122; Duchess of Kingston's Case, ante, p. 213; post, p. 229, note 2; Thompson's Appeal, 57 Penn. St. 175; supra, p. 216, note 9.

[4] Comp. Nougué *v.* Clapp, 101 U. S. 551; Graham *v.* Boston R. Co., 118 U. S. 161; Meadows *v.* Duchess of Kingston, Amb. 756; ante, p. 210, note.

[5] Ibid.

[6] Gurnsey *v.* Edwards, 26 N. H. 224; Robbins *v.* Bridgewater, 6 N. H. 524; Gear *v.* Smith, 9 N. H. 63; Sanborn *v.* Fellows, 22 N. H. 473; Harlow *v.* Pike, 3 Greenl. 438.

[7] See McFeeley *v.* Scott, 128 Mass. 16,

The estoppel in any case, however, precludes only an *impeachment* of the judgment; and there is ground for a distinction between the case of a judgment obtained by perjured evidence and the case of a judgment regularly obtained but based upon a cause of action to which a defence of fraud might have been made. If, for example, judgment by default were obtained upon a contract, it might well be that the defendant could afterwards sue for fraud committed in the contract; for this would not be inconsistent with the judgment, as we have elsewhere suggested.[1] The same would be true of judgment in a contested cause, if no question of fraud was actually raised. The judgment affirms the contract indeed; but the party defrauded may also do this, and still sue for the deceit practised upon him.[2]

18. But that refers to fraud in regard to *jurisdiction*. See ante, p. 203.

[1] Ante, p. 186. And comp. pp. 174–186. See especially Hunt *v.* Brown, 146 Mass. 253, 255; Howlett *v.* Tarte, 10 C. B. N. S. 813, 827, 828; Cromwell *v.* Sac, 94 U. S. 351, 357.

Perhaps judgment by default after issue joined, without other contest by the defendant, deserves consideration by the courts in regard to the effect of the judgment. See Howlett *v.* Tarte, 10 C. B. N. S. 813. The language of that case is very striking, and has been quoted with approval by the Supreme Court of the United States. Cromwell *v.* Sac, 94 U. S. 351, 357. Can there be an estoppel in this case any further than there is when there is a default without plea?

[2] See 1 Bigelow, Fraud, 71, 72; Wanzer *v.* De Baun, 1 E. D. Smith, 261; Michigan *v.* Phœnix Bank, 33 N. Y. 9, 25; Cadaval *v.* Collins, 4 Ad. & E. 858; Whitaker *v.* Merrill, 28 Barb. 526; Jackson *v.* Summerville, 13 Penn. St. 359; Homer *v.* Fish, 1 Pick. 435.

CHAPTER IV.

JUDGMENTS IN REM.

WE proceed now to the consideration of those judgments which avail against all persons, to wit, judgments in rem; the general distinction between which and the class just under consideration and the grounds, such as appear, upon which the distinction rests, have been pointed out on preceding pages.[1] Most of the questions relating to this division of res judicata, so far as the subject of this work is concerned, are common with those relating to judgments in personam of the domestic courts, and to foreign judgments in rem. The latter, as we shall see, stand substantially upon the same footing with the present class of judgments, with certain exceptions to be noticed hereafter. In this connection we shall, therefore, consider only the general lines of this class of estoppels; referring the reader to the chapters mentioned for further details.

The one established case[2] of the full operation of a judgment in rem is an adjudication of prize, or an acquittal thereof,[3] in the Admiralty; it has often been determined that condemnations are conclusive upon all persons, not only of the title or change of property, but also of the findings of *necessary* facts upon which the condemnation was pronounced.[4] And this has been held to be true not only for the purposes of the judgment itself, but also for collateral purposes, such as questions turning upon a warranty of neutrality of a ship in a contract of insurance

[1] Ante, pp. 43 et seq.

[2] Ante, p. 47; post, p. 243.

[3] Cushing *v.* Laird, 107 U. S. 69, 80; The Apollon, 9 Wheat. 362. The decree of acquittal does not decide the title of any particular person, unless conflicting claims are presented and passed upon. Cushing *v.* Laird, supra.

[4] Concha *v.* Concha, 11 App. Cas. 541; s. c. in the Court of Appeal, nom. De Mora *v.* Concha, 29 Ch. D. 268; Hughes *v.* Cornelius, 2 Show. 232; s. c. Ld. Raym. 473; Skin. 59; Carth. 32; Croudson *v.* Leonard, 4 Cranch, 434; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600.

upon her, where the ship has been seized, condemned, and sold for breach of such neutrality.[1] Questions of the conclusiveness of sentences of this character have generally arisen in relation to the adjudications of foreign courts; and the subject will be fully considered in its appropriate place.[2]

Cases of adjudication in the Court of Admiralty in matters of collision have also been thought to afford an illustration of the operation of judgments in rem. In a recent case[3] it was held in an action upon a policy of insurance for a loss by collision at sea that a decree of the Admiralty that the collision had been caused by the negligence of the vessel insured was conclusive of the fact; and the insurers were exonerated from indemnification for the damages which the owners of the vessel insured had been compelled to pay, by reason of their negligence, to the owners of the other vessel. The court said that the only evidence there was of the collision, and of its attendant circumstances, was the transcript of the proceedings of the District Court; but that was sufficient. It showed the judgment of a court of competent jurisdiction proceeding in rem; and such judgment was binding on all persons interested in the thing upon which the process was served. Insurers, as persons having an interest in the thing arrested and made the subject of adjudication, were bound even by the sentence of a foreign prize court, and much more so by the decree of the Admiralty at

[1] Croudson *v.* Leonard, 4 Cranch, 434. See Cushing *v.* Laird, 107 U. S. 69, 80. The effect of Concha *v.* Concha, supra, especially in the Court of Appeal, is, however, to throw some doubt upon the soundness of the rule; and the same doubt is raised by the effect of Brigham *v.* Fayerweather, 140 Mass. 411. But neither of those cases was an admiralty case.

Croudson *v.* Leonard appears in reality to be inconsistent with the prior decision of the same court in Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185; but it does not profess to overrule it. The fact upon which the condemnation under consideration in Fitzsimmons *v.* Newport Ins. Co. proceeded (breach of blockade) was held, as matter of law, not to have been made out; the record indicating on its face that the court had reached an erroneous decision. This is the only ground of distinction between that case and Croudson *v.* Leonard. But that distinction would now be held unsound; it makes no difference that the record shows that the court made an erroneous decision in point of law. See Godard *v.* Gray, L. R. 6 Q. B. 139; post, p. 262.

Both Croudson *v.* Leonard and Fitzsimmons *v.* Newport Ins. Co. are cases touching foreign judgments.

[2] Under Foreign Judgments in Rem.

[3] Street *v.* Augusta Ins. Co., 12 Rich. 13.

home. The court further said that the case was not changed by reason of the fact that the vessel had been delivered to the present plaintiffs claiming as owners under their stipulation. This fact did not convert the case into a proceeding in personam. The stipulation was a substitute for the vessel; and the decree was made, not against the persons, but against the vessel. But the doctrine of this case is not consistent with other decisions, and needs further consideration.[1]

There has been much discussion of the question, what constitutes a judgment in rem by the English law.[2] The case of Hart *v.* McNamara[3] has been thought to show the line of distinction between judgments in rem and in personam, in municipal causes before the late Court of Exchequer. It was an action for the price of liquor sold by the plaintiff. The defence was that the liquor was adulterated. To prove the adulteration the record of condemnation of the rum was offered in evidence; and to connect the plaintiffs with the cause of condemnation a record was offered in evidence of proceedings by the Crown against the defendant for penalties, in which the defendant was convicted. Chief Justice Gibbs held that the record of condemnation was admissible, being in rem; but he refused to admit the record of conviction for penalties, stating that as it was in personam it was not evidence in any case where the parties were different.

But doubt has been thrown upon the authority of this case, so far as relates to the effect of any finding as distinguished from the judgment itself and the title derived from it.[4] The distinc-

[1] New England Ins. Co. *v.* Dunham, 1 Lowell, 253; s. c. 3 Cliff. 332. And comp. Brigham *v.* Fayerweather, 140 Mass. 411; Concha *v.* Concha, 11 App. Cas. 541; s. c. nom. De Mora *v.* Concha, 29 Ch. D. 268. A judge will, indeed, be very apt to use his finding in a collision case in another case pending at the same time in regard to the same collision, though the parties are not the same; as was done in Levi *v.* New Orleans Ins. Assoc., 2 Woods, 63. But whether a judge would do this against objection based upon an offer to produce evidence not before him in the other case, quære? He could use the judgment as a precedent clearly, but not as res judicata. See Stryker *v.* Goodnow, 123 U. S. 527, 538, 539; Chapman *v.* Goodnow, ib. 540; Litchfield *v.* Goodnow, ib. 549.

[2] Ante, p. 45. See also Simpson *v.* Fogo, 29 L. J. Ch. 657; s. c. 32 L. J. Ch. 249, and 1 Hem. & M. 195; Cammell *v.* Sewell, 3 Hurl. & N. 617; s. c. 5 Hurl. & N. 728; Castrique *v.* Imrie, L. R. 4 H. L. 414, 427.

[3] Reported in note, 4 Price, 154.

[4] De Mora *v.* Concha, 29 Ch. D. 268. See s. c. nom. Concha *v.* Concha, 11 App. Cas. 541. See also Brigham *v.* Fayerweather, 140 Mass. 411. Hart *v.*

tion between the two classes of judgments has become less important since the late decisions, which have reduced the number of judgments in rem in regard to findings and grounds apparently to one.[1] The test in regard to the question whether a judgment itself operates in rem, that is, whether the right, title, or status is available generally, appears to be, as we have elsewhere seen,[2] whether (1) all persons were properly made parties, or (2) whether the cause was tried between those who had the exclusive right to try it.[3]

That the record of condemnation of goods in the Exchequer, as a title or as a justification of acts done under it, is conclusive upon all persons was determined as long ago as in the year 1775, in Scott *v.* Shearman.[4] This case was an action of trespass against custom-house officers for entering the plaintiff's house and seizing his goods. The defendants justified under a record of condemnation in the Exchequer. The cause was twice argued, and underwent great examination. Counsel contended that the condemnation was only conclusive of the right of the Crown to the goods, but not conclusive in case the owner could prove that in point of fact they were not seizable and should choose to bring an action against the person seizing for damages by way of collateral remedy. And Mr. Justice Blackstone and all the other judges decided that the action could not be maintained.[5]

McNamara is supported by Magoun *v.* New Eng. Ins. Co., 1 Story, 157. But see Carrington *v.* Merchants' Ins. Co., 8 Peters, 495. Both were revenue cases. There can be no real distinction between revenue and prize cases; but the latter are now considered, so far as established in regard to findings, as exceptions.

[1] Ante, p. 47; post, p. 243; De Mora *v.* Concha, 29 Ch. D. 268; Brigham *v.* Fayerweather, 140 Mass. 411.

[2] Ante, p. 47.

[3] Candee *v.* Lord, 2 Comst. 269; ante, p. 150.

[4] 2 W. Black. 977.

[5] 'The only possible ground,' said the learned judge above named, 'that the plaintiff can rely on in the present case, which is unaccompanied with misbehavior or any unwarrantable violence, is that the goods were not in truth liable to be seized by the laws of the customs; although by the plaintiff's default they have been condemned in the Exchequer. But I take this condemnation to be conclusive evidence to all the world that the goods were liable to be seized, and that therefore this action will not lie. 1. Because of the implicit credit which the law gives to any judgment in a court of record having competent jurisdiction of the subject-matter; the jurisdiction in this case of the Court of Exchequer is not only competent, but sole and exclusive. And though it be said that no notice is given to the owner in person and that therefore he is not bound by the condemnation, not being a party to the suit, yet the seizure itself is notice to the owner,

Mr. Chancellor Kent, in Gelston *v.* Hoyt,[1] referring to this case, says that the law is settled clearly and definitely, that if goods be seized by a custom-house officer, and are libelled, tried, and *condemned* in the Exchequer, District Court, or other court having cognizance of the forfeiture, trespass will not lie against the officer who seized the goods. But the great question in the case before Chancellor Kent was whether, in case of an *acquittal* of the goods, the officer when sued for the seizure could contest the legality of the seizure again. And he held that he could not, for reasons stated in the note.[2]

who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer; he knew they were carried to the king's warehouse; he knew, or might have known, that by the course of law the validity of that seizure would come on to be examined in the Court of Exchequer, and could be examined nowhere else. He had notice by the two proclamations, according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim and trying the point of forfeiture, it was his own laches, and he shall be forever concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it would be nugatory to debar him from recovering *directly* the identical goods that are condemned, if he is allowed to recover *obliquely* damages equivalent to their value. 2. Because the property of the goods being changed and irrevocably vested in the Crown by the judgment of condemnation (as is clear beyond any dispute, and conceded on the part of the plaintiff), it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seizure.(*a*) The spirituous liquors that were seized were therefore at the time of the seizure the goods and chattels of his Majesty, and not of the plaintiff, as in his declaration he has necessarily declared them to be; since neither trespass nor trover will lie for taking of goods unless at the time of the taking the property was in the plaintiff.'

[1] 13 Johns. 561, 583.

[2] 'I entertain no doubt,' said the Chancellor, 'it is equally well settled as the other, and that if the condemnation is a bar to the action, on the one hand, the acquittal is a bar to the defence, on the other. It would be monstrously unjust and repugnant to all principles, if the rule were not so. Ought not the parties to be placed upon equal ground? And if the sentence of condemnation be conclusive in favor of the seizing officer, ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every man of common understanding that the rule, to be just, should be equal and impartial in its operation.' He then proceeds to state that the authorities are on the same side (12 Viner, 95, A. b. 22, 1; Cook *v.* Sholl, 5 T. R. 255), with one exception. Buller N. P. 245. 'The

(*a*) The record of condemnation is conclusive, not only that the goods were liable to seizure at the time of the sentence, but also that they were so liable at the time they were imported. Whitney *v.* Walsh, 1 Cush. 29.

The foregoing case of Gelston *v.* Hoyt was taken to the Supreme Court of the United States, and the judgment was there affirmed.[1] Mr. Justice Story, who delivered the opinion, referring to the passage from Buller, said that though it might be good law in respect to criminal suits, it had no application to proceedings in rem. Where property, he observed, was seized and libelled as forfeited to the government, the sole object of the suit was to ascertain whether the seizure were rightful, and the forfeiture incurred or not. The decree of the court in such case acted upon the thing itself, and bound the interest of all the world, whether any party actually appeared or not. If it was condemned, the title of the property was completely changed, and the new title acquired by the forfeiture travelled with the thing in all its future progress. If, on the other hand, it was acquitted, the taint of forfeiture was completely removed, and could not be reannexed to it. The original owner stood upon his title discharged of any latent claims with which the supposed forfeiture might have previously infected it. A sentence of acquittal in rem therefore ascertained a fact as much as a

reason,' he goes on to say, 'assigned in Buller's N. P. why an acquittal is not conclusive in a collateral action, as well as a condemnation, is that an acquittal *ascertains no fact*, as a conviction does. This is the reason assigned. Thus, it is said, if a party be indicted for bigamy and convicted, it must have been a full proof that he was twice married, and could not have been on any other ground; but if he was acquitted it might have been because he had reason to believe his first wife was dead, though she was not dead; or it might have been for many other reasons, without supposing the second to have been a lawful marriage. All this may be true in that and like cases; but in a case in the Exchequer, where the goods are themselves seized and libelled as forfeited to the government, and which is termed a proceeding in rem, the question of forfeiture is the only question that can be made; and a decree of acquittal does ascertain the fact that they were not forfeited. Indeed, in the next preceding page in Buller an adjudged case is given which completely overturns his distinction. It is the case of Lane *v.* Degberg, Buller N. P. 244, decided in 11 W. 3, prior to the decision before Baron Price. 12 Viner, 95, A. b. 22, 1, supra. It was an action by a soldier against his officer for an assault and battery. The officer justified the act as done in the army for disobedience, and gave in evidence the sentence of a council of war founded on a petition of the plaintiff against him; and the acquittal, being the sentence of a court of exclusive jurisdiction in a case arising under martial law, was held to be conclusive evidence for the officer in the action for the assault and battery.'

[1] 3 Wheat. 246, cited and approved in Coffey *v.* United States, 116 U. S. 436, 444; Williams *v.* Suffolk Ins. Co., 3 Sum. 270, 275. See also Magoun *v.* New Eng. Ins. Co., 1 Story, 157; Slocum *v.* Mayberry, 2 Wheat. 1.

sentence of condemnation; it ascertained and fixed the fact that the property was not liable to the asserted claim of forfeiture.

A decree establishing a person's pedigree is, perhaps, in establishing a title or a right, of like conclusive character; so it was decided in the case of Ennis *v.* Smith.[1] The action was brought against the administrator of the estate of General Kosciusko by persons claiming to be his heirs. To prove their relationship they produced decrees of their family pedigree by the Court of Nobility of Grodno, and another of the Court of Kobryn, in the Russian province of Lithuania. The jurisdiction of these courts having been proved, the Supreme Court of the United States held that the proceedings were in rem and evidence against all the world of the matters of pedigree adjudicated. However, a decree upon the legitimacy of a child cannot, under the laws of Maryland (even if it could by the common law anywhere), be used to establish the question of the legitimacy of other children by the same connection; and this too though the decree was entered only after an issue directed to ascertain whether the father was ever lawfully married to the admitted mother of the children.[2] But the decree in regard to the particular child would probably be conclusive against all the world.[3]

That decrees or sentences in divorce cases, in distinction from the specific necessary findings therein and grounds thereof, also belong to this class is well settled.[4] In Hood *v.* Hood[5] the plaintiff brought a writ of dower against the defendant, who claimed under an assignee in bankruptcy of the plaintiff's late husband. The defendant offered in evidence a decree of divorce

[1] 14 How. 400. See Pittapur *v.* Garu, L. R. 12 Ind. App. 16, where an attempt was unsuccessfully made to raise a question of consanguinity, decided in a different sort of suit between the same parties.

[2] Kearney *v.* Dean, 15 Wall. 51; Blackburn *v.* Crawfords, 3 Wall. 175.

[3] Bunting *v.* Lepingwell, 4 Coke, 29, commonly cited as Bunting's Case. See 2 Wils. 123; Duchess of Kingston's Case, Everest & Strode, Est. 424. And see the last-cited work, p. 89.

[4] Hood *v.* Hood, 11 Allen, 196; 110 Mass. 463; Burlen *v.* Shannon, 3 Gray, 387, 389; s. c. 99 Mass. 200; Smith *v.* Smith, 13 Gray, 209, 210. See Perry *v.* Meddowcroft, 10 Beav. 122; Meddowcroft *v.* Huguenin, 4 Moore, P. C. 386; Bunting *v.* Lepingwell, 4 Coke, 29; Robins *v.* Crutchley, 2 Wils. 122, 127. Questions relating to the conclusiveness of decrees in cases of marriage and divorce have more frequently arisen in cases of foreign decrees; and the reader is referred to the chapter on Foreign Judgments in Rem for further information.

[5] 110 Mass. 463.

obtained by the husband in Illinois, on the ground of desertion, and also a decree in Massachusetts [1] dismissing a libel by the present plaintiff for divorce, which was found, under evidence held admissible, to have been rendered on the ground that the decree of the Illinois court was valid and binding. The present plaintiff now offered evidence to show that the Illinois decree was obtained by fraud, and this was received in the lower court; but the Supreme Court held that the case was concluded by the decree dismissing the wife's libel, and reversed the decision below. The court declared, after looking into the ground upon which its own former decree was based, that the effect of the judgment was to determine the status of the present plaintiff, and in that respect, and to that extent, concluded all the world.

It is not to be inferred from the fact that the court in Hood *v.* Hood looked into the ground of its former decree that a finding, as distinguished from the decree, would operate against all persons. The court only desired to know whether its former decree dismissing the wife's libel was rendered upon the merits or not. Besides, there had been no finding in Illinois in regard to fraud; there was no appearance there by the wife. Indeed, the language of the court in Hood *v.* Hood, as given above, clearly indicates that only the decree operates in rem, as must have been the case without overruling what had already been decided.[2] Thus, in Burlen *v.* Shannon it is laid down that in an action for the board of the defendant's wife a decree dismissing for want of proof a libel for divorce by her, alleging extreme cruelty which compelled her to leave him, was not conclusive that she had left her husband unjustifiably. So too it is held in Rhode Island that a decree dismissing a husband's petition for divorce for adultery by the wife did not estop him to show, in defence of an action against him for necessaries by a third person, that she *had* committed adultery.[3] And even in regard to the decree itself fixing, as it is commonly put, the

[1] 11 Allen, 196.

[2] Burlen *v.* Shannon, 3 Gray, 387, 389; Smith *v.* Smith, 13 Gray, 209, 210.

[3] Gill *v.* Read, 5 R. I. 343. See Needham *v.* Bremner, L. R. 1 C. P. 583, where, in a similar case, there had been no decree of divorce because both parties had been found guilty of adultery. The finding was held no estoppel.

status of the parties,[1] it is held that a child en ventre sa mère at the time may show that the decree was obtained by collusion between the parties.[2] Whether a third person could have the benefit of one of our statutes against divorces fraudulently obtained does not appear to have been decided.

The decrees of the Court of Probate and of like courts upon the testamentary character of instruments, and upon the title derived from a grant of letters of administration and like acts[3]

[1] Indeed, it has been decided upon great consideration that a decree of divorce for desertion is not conclusive, between the wife and a stranger, of the lawful marriage of the parties to the divorce cause, in a case not contested. Williams *v.* Williams, 63 Wis. 58. This was on the ground that the question of marriage would not be much considered in such a case. Besides, by the laws of Wisconsin an ordinary decree of divorce was held not to have the same effect as a decree in an action for affirmance or annulment of marriage. Ibid.

[2] Meddowcroft *v.* Huguenin, 4 Moore P. C. 386. See Perry *v.* Meddowcroft, 10 Beav. 122. Fraud not amounting to collusion was in the first case held to be insufficient ground to impeach the judgment. The Duchess of Kingston's Case, ante, p. 91, Everest & Strode, Estoppel, App. B, so much cited, was an indictment for bigamy, to which the defendant pleaded a sentence of the Ecclesiastical Court in her favor, in a suit for jactitation of marriage, i. e. claiming and boasting of a marriage with her, against A H. The House of Lords held that the sentence was not conclusive against the Crown, but in any event that it might be impeached for fraud and collusion. Formerly decrees of divorce themselves in the Ecclesiastical Court were not conclusive even between the parties. Oughton, Ordo Judic. 28, tit. 14; ib. p. 306, §§ 3, 4; Bracton, 304; Robins *v.* Crutchley, 2 Wils. 122, 127. And judgments in suits for jactitation do not stand upon the footing of decrees of or against divorce. See Everest & Strode, Estoppel, 84; ante, p. 92, note.

The Duchess of Kingston's Case contains in the arguments and opinion a review of nearly all the early cases, to wit: Jones *v.* Bow, Carth. 225; Bunting *v.* Lepingwell, 2 Coke, 355, and 4 Coke, 29; Kenn's Case, 4 Coke, 136; Blackham's Case, 1 Salk. 290; Hatfield *v.* Hatfield, 5 Brown's Parl. Cas. 100 (cited in Da Costa *v.* Villa Real, 2 Strange, 960); Clews *v.* Bathurst, 2 Strange, 960, and Cas. temp. Hardw. 11; Da Costa *v.* Villa Real, supra; Noel *v.* Wells, 1 Lev. 235 (cited 1 Ld. Raym. 262); Bransby *v.* Kerridge, 1 P. Wms. 548; Hughes *v.* Cornelius, 2 Show. 232; Burrows *v.* Jemino, 2 Strange, 733; Philips *v.* Bury, 2 T. R. 346; Biddulph *v.* Ather, 2 Wils. 23; Rex *v.* Vincent, 1 Strange, 481; Rex *v.* Grandon, 1 Cowp. 315; Morris *v.* Webber, Moore, 225; Corbet's Case, cited 4 Coke, 140; Millisent *v.* Millisent, cited Cas. temp. Hardw. 11; Rex *v.* Rhodes, 2 Strange, 703; Boyle *v.* Boyle, 3 Mod. 164; Webb *v.* Cook, Cro. Jac. 535 and 625; Fursman *v.* Fursman (no report named); Robins *v.* Crutchley, 2 Wils. 118; Roach *v.* Garvan, 1 Ves. 157; Lloid *v.* Maddox, Moore, 917; Prudham *v.* Phillips, 2 Amb. 762, and other cases.

[3] Not upon orders of distribution. Ruth *v.* Oberbrunner, 40 Wis. 238; Bresee *v.* Stiles, 22 Wis. 120. And of course the settlement of accounts in probate by executors or administrators binds those only who are really made parties. Butterfield *v.* Smith, 101 U. S. 570; Ritchey *v.* Withers, 72 Mo. 556. Further, of the effect of decrees in pro-

are also conclusive, when acting within its jurisdiction, upon all persons.[1] Thus, the decree of probate admitting a will to record conclusively establishes against all persons the fact that the will was executed according to the law of the country in which the testator was domiciled, though it does not so establish his domicil,[2] even if the fact was found.[3] The finding of such fact is not necessary to the probate of a will.[4]

In establishing the testamentary character of an instrument offered for probate as a will the decree establishes inter partes, but not inter omnes,[5] the capacity of the testator to make it, and inter omnes the genuineness of the instrument.[6] It merely establishes the fact towards all the world that there is nothing to prevent its being admitted to probate as a will, and that it is a valid will. That it does not establish the testator's mental capacity inter omnes has lately been decided in Brigham *v.* Fayerweather.[7] That was a bill in equity to set aside a mortgage made by B on the ground that she was of unsound mind when she executed it. To show her sanity the defendants offered in evidence the adjudication of the Probate Court allowing a will made by her, and also evidence that her mental

bate, see Hatcher *v.* Dillard, 70 Ala. 343; Davis Machine Co. *v.* Barnard, 43 Mich. 379; Yeoman *v.* Younger, 83 Mo. 424; Carver *v.* Lewis, 104 Ind. 438.

[1] Plume *v.* Howard Inst., 46 N. J. 211; Lawrence *v.* Engleaby, 24 Vt. 42; Farrar *v.* Olmstead, ib. 123; Steen *v.* Bennett, ib. 303; Loring *v.* Steineman, 1 Met. 204. See Vaughan *v.* Suggs, 82 Ala. 357; Nelson *v.* Boynton, 54 Ala. 368, 376; Deslonde *v.* Darrington, 29 Ala. 95; Lancaster's Appeal, 47 Conn. 248; Connolly *v.* Connolly, 32 Gratt. 652; and the very important cases of Whicker *v.* Hume, 7 H. L. Cas. 124, De Mora *v.* Concha, 29 Ch. D. 268, and Brigham *v.* Fayerweather, 140 Mass. 411.

[2] Whicker *v.* Hume, 7 H. L. Cas. 124; De Mora *v.* Concha, 29 Ch. D. 268; affirmed nom. Concha *v.* Concha, 11 App. Cas. 541. Notwithstanding what was said by Lord Westbury in Enohin *v.* Wylie, 10 H. L. Cas. 1, 13, to the effect that the courts of the domicil have exclusive jurisdiction of the administration of personal estate, it is now held that the courts of other countries as well, when occasion arises, have jurisdiction. The *law* of the domicil governs, but resort may be had to the courts of other countries. Lord Selborne in Ewing *v.* Orr Ewing, 10 App. Cas. 453, 502; In re Trufort, 36 Ch. D. 600, Stirling, J. And see Concha *v.* Concha, supra.

[3] Concha *v.* Concha, supra.

[4] Ibid.

[5] Brigham *v.* Fayerweather, 140 Mass. 411. But see Goodman *v.* Winter, 64 Ala. 410; Williams *v.* Saunders, 5 Cold. 60, 74, dictum; Archer *v.* Mosse, 2 Vern. 8, only a question of jurisdiction, however.

[6] Newman *v.* Waterman, 63 Wis. 612, 626, dictum, but clear law.

[7] 140 Mass. 411.

capacity was no less when she executed the mortgage than when she executed the will. The defendants had not been parties in interest in the probate proceedings. It was held in a strong opinion of the court by Mr. Justice Holmes that the decree was not even admissible evidence upon the point.

Again, the probate of a will does not establish the fact that the dispositions made therein were not beyond the testator's power.[1] The result, indeed, as has already been stated, is that it is the *judgment* of the Probate Court on the will, as distinguished from specific findings or facts necessarily involved therein, that is binding upon all persons.[2] And the judgment is conclusive inasmuch as the executor, who offers the will for probate, is deemed to represent all who claim under the will,[3] while they and all who claim against it are warned to appear.[4] The executor does not, however, represent adverse claimants under the will, in regard to their claims.[5]

The case of Lawrence *v.* Englesby, above cited, shows the conclusiveness of title derived under a grant of letters of administration. That was a petition for appointment as administrator as matter of right; alleging that the respondent claimed to be administrator of the same estate, but that he had not been legally appointed, that he was not entitled to the position, and that he was an improper person for it. In reply the defendant set forth his appointment by a Court of Probate, at the request of certain heirs and next of kin of the intestate, and that no appeal had been taken from the order. The defence was held good. The Supreme Court said that it could not in a collateral way review the correctness or propriety of a decree of a Court of Probate acting within its jurisdiction. Whether the defendant

[1] Comp. Concha *v.* Concha, 11 App. Cas. 541; s. c. in C. A.; De Mora *v.* Concha, 29 Ch. D. 268.

[2] Concha *v.* Concha, supra; Brigham *v.* Fayerweather, supra. See Williams *v.* Williams, 63 Wis. 58.

[3] Concha *v.* Concha, supra.

[4] Ante, p. 43.

[5] 'Where two litigants both claim under a third person, it seems that such third person can never be a "legitimus contradictor" on behalf of one of them against the other of them. We conceive it to be plain that if a man appointed an executor, and after his death a question arose between the residuary legatee and his next of kin as to whether there was an intestacy (entire or partial), the executor would no more represent the residuary legatee than the next of kin, because each of these two litigants would assert that the executor held the property in dispute for his benefit.' De Mora *v.* Concha, at p. 305. Fry, L. J.

was a proper person to be appointed administrator, and whether a request by only a part of the next of kin was sufficient to warrant the grant of letters, were questions properly arising before the court; and if the petitioner felt aggrieved, he should have appealed.[1]

In like manner an adjudication of the domicil, or the confirmation of an order of removal, of a pauper under the peculiar statutes of England and of some of our states concludes the appellant in favor of all the world.[2] In West Buffalo *v.* Walker, just cited, Chief Justice Gibson says that there are three modes of disposing of an order of removal, each having a different effect in point of conclusiveness. The first is by confirmation, which, as has been stated, is conclusive in favor of strangers; the second is by discharging the order, in which case the adjudication is conclusive only between the parties litigant; the third is by quashing it, in which case the order is not conclusive upon

[1] In the case of Loring *v.* Steineman, just cited, Shaw, C. J. had occasion to say: 'In many cases courts of peculiar jurisdiction have jurisdiction of the subject-matter absolutely, and persons are concerned incidentally only, according to their respective rights and interests; as in a question of prize the jurisdiction of the Court of Admiralty extends to the question whether prize or not, and by adjudicating upon that question settles it definitely in regard to all persons interested in that question, whether they have notice or not. And we think the distribution of an intestate estate is analogous. The subject-matter, the property, is within the jurisdiction of the court, and the judgment, by determining who are entitled to distributive shares, and extending to the entire estate, determines that no other persons are entitled, and is necessarily conclusive because nothing further remains to be distributed.' See also Litchfield *v.* Cudworth, 15 Pick. 23; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190; Bogardus *v.* Clark, 4 Paige, 623; Fry *v.* Taylor, 1 Head, 594; Cecil *v.* Cecil, 19 Md. 72. And the same doctrine and reasons apply to proceedings in insolvency. Merriam *v.* Sewall, 8 Gray, 316, 327. Letters of administrations are considered in collateral actions as not even prima facie evidence of death or of next of kin, except between the parties. De Mora *v.* Concha, 29 Ch. D. 268, 286, 297; Morin *v.* St. Paul Ry. Co., 33 Minn. 176; Brigham *v.* Fayerweather, 140 Mass. 411, 415, distinguishing several cases.

[2] Rex *v.* Cirencester, Burr. Sett. Cas. 18; Rex *v.* Bentley, ib. 426; West Buffalo *v.* Walker, 8 Barr, 177. See Cabot *v.* Washington, 41 Vt. 168. This is not true in Connecticut. Bethlehem *v.* Watertown, 47 Conn. 237. And see Renovo *v.* Half-Moon, 78 Penn. St. 301. This subject has undergone searching consideration in the decision of a probate case, and serious question made whether findings in orders of removal are binding upon strangers except perhaps in the same class of cases. De Mora *v.* Concha, 29 Ch. D. 268, affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541. Comp. also Brigham *v.* Fayerweather, 140 Mass. 411.

any one. An order of removal, the learned Chief Justice said, was confirmed after a unsuccessful objection to it, for want of merits, or for want of form, or for want of regularity; it was discharged or vacated after a successful objection to it on the merits; and it was quashed for informality or irregularity of proceeding. The order to quash was like a reversal on a writ of error, leaving the parties where they began.[1]

In like manner also a decree in Louisiana appointing a tutor to a minor, if rendered by a court of competent jurisdiction, cannot be impeached in any collateral action by a debtor of the minor.[2] 'So long,' said Mr. Justice Buchanan, 'as that judgment stands unreversed it constitutes a full warrant for the demand and collection, by the person therein named as tutor, of debts due to the minor.'

A judgment confirming the report of commissioners appointed to establish the boundary line between adjoining towns, under the statutes of New Hampshire, also concludes all persons.[3] In the case cited Mr. Justice Sawyer said that it was manifest that great mischief would result if the question, when any doubt arose, should be left in such a state that one jury should be permitted to find one way and another another way as to the boundary. Public interest and the rights of individuals required that the matter be settled by an adjudication that should be final and conclusive upon all the world. But the court further decided that the judgment was equally conclusive upon the question where the boundary had previously been. It was said that to determine what the effect of the adjudication since the commencement of the suit was to be, upon the rights of the parties involved in it, it was only necessary to understand the character of the proceeding under the provisions of the statute which declared it final. It was not a proceeding relating to private transactions, or a controversy between individuals or particular parties. The adjudication was not directly for the purpose of determining private rights, or of deciding a contro-

[1] See Rex v. Bradenham, Burr. Sett. Cas. 394, concerning which Chief Justice Gibson says that the expression 'quashed on the merits' was inadvertently used for 'discharged.'

[2] Succession of Gorrisson, 15 La. An. 27. See also Cailleteau v. Ingouf, 14 La. An. 623.

[3] Pitman v. Albany, 34 N. H. 577.

versy between party and party. It related to a subject of public nature, beyond the rights of litigants, and was strictly a proceeding in rem. Its object was to declare the state, condition, or situation of the subject-matter, the true location of the boundary, in a proceeding instituted under the provisions of the law for that object only. In this adjudication it was not merely declared what was to be the recognized and established boundary thereafter; the judgment pronounced where the true boundary was, as established by the only competent authority to limit and define it, the legislative act. In decreeing where the boundary was, as thus established, it was necessarily declared also where it always had been, since the proper power was exercised in establishing it by the legislative act, or by the grant from the king if established during the colonial history; and also where it always would be until altered by like competent authority.

We have already adverted to the fact that proceedings in attachment, replevin, and the like, are not properly proceedings in rem, though they are sometimes spoken of as such.[1] The point has been judicially determined in several cases, as we have seen, that those proceedings affect only the actual parties to the litigation, and those who claim through them.[2]

A distinction may be noticed between those judgments which incidentally establish reputation, custom, a public ferry, and matters of the kind, and judgments strictly in rem. The latter bind third persons; they are conclusive evidence against all the world. The former may be evidence against strangers, but they are not conclusive.[3] The direct object of the suit in Pim *v.* Curell, just cited, was to recover tolls; and though it was necessary to the recovery to establish the existence of the ferry, still it was not necessary to establish *a* ferry in general. In other words, the object of the suit was to determine the right to tolls as between the *plaintiff* and the *defendant*, and not as between the plaintiff

[1] Ante, pp. 49, 50.

[2] Mankin *v.* Chandler, 2 Brock. 125, Marshall, C. J.; Megee *v.* Beirne, 39 Penn. St. 50; Woodruff *v.* Taylor, 20 Vt. 65; The Bold Buccleugh, 7 Moore P. C. 267, 282.

[3] Pim *v.* Curell, 6 Mees. & W. 234; Carnarvon *v.* Villebois, 13 Mees. & W. 313; Neill *v.* Devonshire, 8 App. Cas. 135, 147; ante, p. 36, note 6.

and all the world. It was not necessary therefore to examine the question of the existence of the ferry in all possible bearings, but only in its relations to two persons. Moreover, a judgment in rem could not be determined in an action for tolls, though there were a hundred defendants, for the judgment could only be broad enough to bind those very parties. The object of such a suit would be to establish the plaintiff's right to tolls against a certain number of persons; and the existence of the ferry would be proved merely to establish the right as against *them*. The point of distinction, then, is that in the cases first mentioned the particular fact has been determined only incidentally and with reference to the rights of certain determinate persons.

It has been held under a statutory provision that an unsatisfied judgment against a vessel is no bar to a suit in personam against the owners for the same cause of action.[1] The court in the case cited said that if the action were strictly in rem, it was clear that no judgment could be rendered that could be enforced against any other property belonging to the owner. It was therefore evident that a judgment against the vessel was not even substantially a judgment against the owners, and that consequently the former recovery relied on was no bar to the present action. Dr. Lushington has, however, expressed a contrary view even in regard to foreign decrees, in a dictum in a recent case.[2]

[1] Toby. *v.* Brown, 6 Eng. 308.

[2] The Griefswald, Swabey, 430.

CHAPTER V.

FOREIGN JUDGMENTS IN REM.

WE come now to the consideration of Foreign Judgments; under which general term we include the judgments of foreign countries, of English colonies, and of the sister American states. We now reverse the order adopted in the consideration of the judgments of the domestic courts, and enter first into an examination of the cases relating to foreign judgments in rem, and then of those upon the other and more extensive division, calling the reader's attention at the same time to what has been said in the chapter on Res Judicata in regard to the general nature of judgments in rem, and the reasons, such as have from time to time been advanced, why they are deemed conclusive against all persons.[1]

The same reason has prevailed for the order mentioned which led to the order adopted in the preceding chapters, namely, the fact that in an historical point of view the division first presented in each case first appeared in the conclusive character of an estoppel. It is quite probable that, merely as adjudications, judgments in personam appeared first in both cases; but as conclusive evidence it was otherwise in the case of foreign judgments, as will presently be seen.

First, then, concerning foreign judgments in rem. Such judgments have from early times been received with great respect both in the courts of England and in those of America, in strong contrast in many instances to the consideration shown to foreign judgments in personam. As long ago as in the year 1781 Lord Mansfield declared that the sentence of condemnation of a vessel by a French Court of Admiralty was conclusive (if the court had jurisdiction) and could not be collaterally impeached; that

[1] Ante, pp. 43 et seq.

it could only be called in question by a proceeding in appeal;[1] or, he might perhaps have added, by a direct proceeding instituted for the purpose of setting it aside. Only three years before this the same great commercial lawyer had said that a judgment in personam of a court sitting in an English colony was but prima facie evidence of debt, and hence liable to impeachment in England in a suit upon the same.[2]

The most familiar illustrations of the rule are to be found in the adjudications of foreign courts of admiralty in matters of prize; and Hughes *v.* Cornelius[3] is a leading case of the kind. It was an action of trover for a ship and goods. Upon a special verdict it was found that the owner of the ship in question, and the master, were denizens of England, and that the mate and nearly all the crew were Englishmen; that the vessel was taken during a war between France and Holland, condemned as a *Dutch* prize in a French Court of Admiralty, and sold to the plaintiff Hughes under the sentence; that on the arrival of the vessel in England the defendant Cornelius and others, the servants of the former master, took and converted her to their own use. Upon the production of the sentence of the Admiralty the court refused to allow the verdict to be argued, but ordered judgment to be entered for the plaintiff; for, it was said, the sentence of a Court of Admiralty ought to bind generally, according to the law of nations, notwithstanding the fact that the verdict had falsified the sentence in respect of the nationality of the vessel. The language of the court was that 'as we are to take notice of a sentence of the Admiralty here, so ought we of those abroad, in other nations; and we must not let them at large again, for otherwise the merchants would be in a pleasant condition. For suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their coun-

[1] Bernardi *v.* Motteux, 2 Doug. 574. See Bolton *v.* Gladstone, 5 East, 155, 160; Lothian *v.* Henderson, 3 Bos. & P. 499; De Mora *v.* Concha, 29 Ch. D. 268, 301, affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541.

[2] Walker *v.* Witter, 1 Doug. 1.

[3] 2 Show. 232; s. c. Carth. 32; Skin. 59; 2 Ld. Raym. 893, 935; T. Raym. 473.

tries in such particulars. If you are aggrieved, you must apply yourself to the king and council; it being a matter of government, he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.'

It is often said that the courts of England in adopting the rule in Hughes *v.* Cornelius, and the courts of America in following the same, have been actuated by motives of comity. But it has been more satisfactorily declared that the true ground upon which effect is given to a foreign judgment in favor of the plaintiff is that of legal obligation, as in the case of domestic judgments.[1] That a similar view might be entertained of all rights acquired by virtue of a foreign judgment, whatever the nature of such rights, is assuredly within reason.[2] And to such rights would attach, inter partes or inter omnes according to the particular case, all findings necessary to their existence. Indeed, there can be no ground for difference in the treatment, as matter of legal obligation, of contracts made abroad and judgments (whether in rem or in personam) pronounced abroad. When jurisdiction has been properly acquired, the law of the land under which it has been acquired should be deemed the law of all the proceedings in the cause, so as to make the judgment and findings everywhere binding.

This conclusive effect accorded the judgments of foreign tribunals proceeding in rem has been extended to cases of capture and judicial sale in Algiers.[3] The case cited was of a British ship

[1] See Godard *v.* Gray, L. R. 6 Q. B. 139, 148, where it is said that foreign judgments are enforced in England upon the principle thus stated by Parke, B. in Williams *v.* Jones, 13 Mees. & W. 628, 633: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' This passage is quoted with approval again in Rousillon *v.* Rousillon, 14 Ch. D. 351, 370, and in Schibsby *v.* Westenholz, L. R. 6 Q. B. 155. See also Russell *v.* Smyth, 9 Mees. & W. 810, 819, Nouvion *v.* Freeman, 37 Ch. D. 244, 256, Lindley, L. J. It surely cannot be from motives of comity that the courts of England enforce the judgments of French courts, when the latter refuse to do likewise with the judgments of English courts.

[2] Upon the doctrine of comity in regard to foreign judgments, see the able treatise of Mr. Piggott on Foreign Judgments (London, 1879, 1881).

[3] The Helena, 4 Ch. Rob. 3.

which had been captured by an Algerine corsair and sold by the Dey of Algiers to a merchant of Minorca, and by him sold to the present holder. Upon the arrival of the ship in English waters a warrant was applied for by the former owner to arrest the ship; but the court, refusing the warrant, directed a monition to issue calling upon the possessor to show cause why the ship should not be restored to the former owner. It was contended in his behalf that the seizure by the Algerine corsair was not a lawful capture, so as to convert the property. But the court held the contrary.[1]

[1] Sir William Scott, in delivering judgment, said: 'This ship appears to have been taken by the Algerines, and it is argued that the Algerines are to be considered in this act as pirates; and that no legal conversion of property can be derived from their piratical seizure. Certain it is that the African states were so considered many years ago; but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relation of legal states. So long ago as the time of Charles II., Molloy speaks of them in language which, though sufficiently quaint, expresses the true character in which they were considered in his time.' He then quotes Molloy as follows: 'Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war as other towns or places; for though they acknowledge the supremacy of the Porte, yet all the powers of it cannot improve on them more than their own wills voluntarily consent to. The famous Carthage, having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers till the knowing Cato gave counsel for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, and now what open hostility denied, by thieving and piracy continues; as stinking elders spring from those places where noble oaks have been felled; and in their art are become such masters, and to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet it is great in mischief; the consideration of which put fire into the breast of the aged Louis IX. to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it; whereupon a council of war being called, the question was whether the same should be summoned, and carried it should not; for it was not fit the solemn ceremonies of war should be lavished away on a company of thieves and pirates. Notwithstanding this Tunis and Tripoli, and their sister Algier, do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates), yet having acquired the reputation of a government, they cannot properly be esteemed pirates, but enemies.' Molloy, p. 33, § 4.

Sir William then proceeds: 'Although their notions of justice to be observed between nations differ from those which we entertain, we do not on that account venture to call in question their public acts. As to the *mode* of confiscation which has taken place on this vessel, whether by formal sentence or not, we must presume it was regularly done *in their way* and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation is evident from this circumstance, that the dey himself ap-

The condemnations of foreign admiralty courts in prize cases have also been held conclusive not only for their own proper purposes, but for other purposes as well; the findings of fact for which the property was condemned being held conclusive in all other causes. The case of Croudson *v.* Leonard [1] affords a good illustration of this rule. It was held in that case that the sentence of condemnation of a foreign Court of Admiralty for breach of blockade was conclusive, not merely of the change of property, but also of the breach. It was an action upon a policy of insurance containing a warranty that the vessel was neutral property, and therefore bound to conduct not inconsistent with neutrality.[2] Mr. Justice Washington stated it to be the well-established law, both of this country and of England, that the sentence of a foreign court of competent jurisdiction, condemning property on the ground that it was not neutral, is so conclusive of the breach of neutrality that it can never be controverted in any other court of concurrent jurisdiction.[3]

pears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation according to their notions for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The dey intervened in the transaction as legalizing the act. The transfer appears besides to have been passed in a solemn manner before the public officer of the Spanish government the Spanish consul; and in the subsequent instance the property is again transferred to the present possessor under the public sanction of the judge of the Vice-Admiralty Court of Minorca.' But in the case of a vessel seized and confiscated in Mexico, by the record of the proceedings of which it appeared that there was no suitable allegation of an offence in the nature of a libel, and that there was no statement of facts ex directo upon which the sentence professed to be founded, it was held that the sentence was not conclusive of the cause of seizure and condemnation. Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600; Sawyer *v.* Maine Ins. Co., 12 Mass. 291.

[1] 4 Cranch, 434.

[2] See also Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600; Peters *v.* Warren Ins. Co., ib. 389; Baxter *v.* New Eng. Ins. Co., 6 Mass. 277.

[3] 'All the world,' he said, 'are parties in an admiralty cause. The proceedings are in rem, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every

The courts of England at an early period adopted this expression of the rule in Hughes *v.* Cornelius, with the qualification that the record should show clearly the ground of the condemnation.[1] And the same doctrine has been held in America;[2] but the courts of New York hold that, while the sentence of a foreign Court of Admiralty condemning property as good and lawful prize is conclusive indeed to change the property, it is only prima facie evidence of the facts on which the condemnation purports to have been founded; and that these matters may be disproved in a collateral action.[3] Some doubt perhaps is left by the recent case of De Mora *v.* Concha[4] whether Hughes *v.*

instance has an opportunity to controvert the alleged grounds of condemnation by proving, if he can, the neutrality of the property.' Remarking on the case of Hughes *v.* Cornelius, already cited, he said: 'The authority of the case of Hughes *v.* Cornelius, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and the insured is denied. It is true that in that case the only point expressly decided was that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences. The case, so far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that by the general rule of law the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence, it would seem to follow that if the sentence of a foreign Court of Admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was in effect enemy property. Can the parties to that sentence be bound by so much of it as works a loss of the property, . . . and yet be left free to litigate anew, in some other form, the very point decided from which this consequence flowed?'

[1] Lothian *v.* Henderson, 3 Bos. & P. 499; Baring *v.* Clagett, ib. 201; Fernandez *v.* Da Costa, Park, Ins. 170; Bernardi *v.* Motteux, 2 Doug. 574; Bolton *v.* Gladstone, 5 East, 155; Hobbs *v.* Henning, 17 C. B. N. S. 791; Dalgleish *v.* Hodgson, 7 Bing. 495.

[2] See Magoun *v.* New Eng. Ins. Co., 1 Story, 157; Dempsey *v.* Ins. Co. of Penn., 1 Binn. 299, note; Baxter *v.* New England Ins. Co., 6 Mass. 277; Stewart *v.* Warner, 1 Day, 142.

[3] Durant *v.* Abendroth, 97 N. Y. 132, 141; Ocean Ins. Co. *v.* Francis, 2 Wend. 64; s. c. 6 Cow. 404; Radcliff *v.* United States Ins. Co., 9 Johns. 277; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; Smith *v.* Williams, 2 Caines's Cas. 110, 118.

[4] 29 Ch. D. 268, affirmed on appeal by the House of Lords nom. Concha *v.* Concha, 11 App. Cas. 541, where the case again underwent great examination.

Cornelius would now be followed in England [1] in regard to the conclusiveness, inter omnes, of findings and grounds of the judgment, as distinguished from the judgment itself.[2]

It is furthermore immaterial that the sentence of condemnation was erroneous, or that it was even made under a decree subversive of the law of nations, one, for instance, like the Milan decree, which had been repudiated by the United States government. An erroneous judgment is binding in collateral actions, according to the better opinion, as we conceive, though the error is apparent from the record.[3] Advantage of the error can only be taken in an appellate court. The inquiry, it is laid down, should be: first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sat; and secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide upon the disposition of the property, and the court has acted within its jurisdiction. If these conditions are met, the judgment concludes all the world.[4] But if the judgment was contrary to the 'natural principles of justice,' it will be held void, as we shall see.[5]

[1] And in America there is a similar doubt. Brigham v. Fayerweather, 140 Mass. 411, a case touching decrees in the Court of Probate, but referring (on p. 414) to the present subject.

[2] Ante, pp. 223, 224. Comp. Williams v. Williams, 63 Wis. 58, decree of divorce for desertion, not contested, held not conclusive of marriage.

[3] Williams v. Armroyd, 7 Cranch, 423; Imrie v. Castrique, 8 C. B. N. S. 405. Affirmed, L. R. 4 H. L. 414. See Richards v. Barlow, 140 Mass. 218, 221; post, pp. 262, 263. Foreign decrees in admiralty have been impeached, in former times, in this country, when the record has shown that the court came to an erroneous decision in point of law. Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185. But such cases would not now be followed here, it is apprehended, any more than in England. Godard v. Gray, L. R. 6 Q. B. 139; Imrie v. Castrique, infra. See further, post, p. 262.

[4] Castrique v. Imrie, L. R. 4 H. L. 414, Blackburn, J.

[5] In the case of Imrie v. Castrique, just cited, there had been an adjudication in a French admiralty court against an English ship in regard to matters over which the English law should have governed, which law, if properly applied, would have resulted in a different decree. The English law was laid before the French court; and the counsel who sought to impeach the decree contended that it had been contemptuously thrown aside by the court in France. Upon this point Cockburn, C. J. said: 'It is alleged that the French courts have shown a contemptuous disregard of the law of England, the only law applicable to the case, first, in holding that upon the mere contract of the master for necessaries a charge upon the vessel follows by

Thus far of the one case of a pure judgment in rem, concluding all the world not only in regard to the judgment itself, but also in regard to all necessary findings and grounds thereof.[1] Foreign decrees confirming marriage or granting divorce, when pronounced by courts of competent jurisdiction, are also, in regard to the judgment itself, but no further,[2] conclusive against the world. Lord Hardwicke, in speaking of a sentence relating to marriage, which it had been urged was valid by reason of the fact that it had been established by a court in France, is reported to have said: 'It is true that if so it is conclusive, whether in a foreign court or not, from the law of nations in such cases,

operation of law; secondly, in holding that no transfer of a vessel could take place while the ship was on her voyage, to the prejudice of creditors, or without such transfer appearing on the ship's papers; propositions which, though in accordance with the French law, are wholly incorrect with reference to the law of this country. With regard to the first of these objections it is to be observed that the point was never raised at all before the civil tribunal of Havre under the decree of which court the sale of the vessel took place. The plaintiff Castrique, so far as we can gather from the account of the proceedings contained in the special case, confined himself to the production of his bill of sale, conceiving that that alone was sufficient to establish his right to the ship. The distinction between the French law and our own as to the hypothecation of a ship by the act of the master does not appear to have been at all adverted to. It cannot, therefore, be said that the court in this particular intentionally disregarded the law of this country. Upon the other point there was no doubt an express decision, and one inconsistent with English law. But it does not at all appear that the court set aside the law of England as inapplicable; it simply misconceived it. The law of England put forward by French advocates was probably expounded in a very imperfect manner, and without the production of authority to support a position which to French judges would probably seem untenable. The court, therefore, too hastily concluded that the law of England must be what, according to their view, the law of every mercantile community ought to be. But in deciding that the transfer of property in the ship could not be made during the absence of the ship on a voyage so as to affect the right of third parties, and that the transfer was invalid because it was not indorsed on the certificate of registry, the court professed to be acting on the law of England, not to be setting up the law of France as overriding it. All that can be said, therefore, is that they have misconceived the English law, and that the judgment was erroneous. But the result of the authorities on this subject clearly establishes that a judgment in rem of a foreign tribunal, turning on a question of English law, cannot though erroneous be questioned by a court in this country any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter.' See Cammell *v.* Sewell, 5 Hurl. & N. 728; Simpson *v.* Fogo, 1 Hem. & M. 195; s. c. 9 Jur. N. s. 403; Lang *v.* Holbrook, Crabbe, 179; post, pp. 262, 263.

[1] Ante, pp. 47, 223.

[2] Ante, pp. 227–229.

otherwise the rights of mankind would be very precarious and uncertain.'[1]

The most serious question in these cases of foreign divorce is generally in respect of the jurisdiction of the court.[2] It needs

[1] Roach v. Garvan, 1 Ves. Sr. 158. See case cited in Boucher v. Lawson, Cas. temp. Hardw. 85, 89; Kennedy v. Cassilis, 2 Swanst. 326, note; Burden v. Shannon, 99 Mass. 200. But this doctrine, though 'firmly held,' to use the language of Mr. Justice Story (Confl. Laws, § 597), in America and Scotland, has not been fully accepted in the courts of England. In the case of Sinclair v. Sinclair, 1 Hagg. Con. 294, the validity of a sentence of divorce pronounced in a foreign country was alleged in bar of proceedings in the Ecclesiastical Court. Lord Stowell said: 'Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper court, for adultery would be entitled to credit and attention in this court. But I think the conclusion is carried too far when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country. But I am not prepared to say that a judgment of a third country on the validity of a marriage not within its territories nor had between subjects of that country would be universally binding. For instance, the marriage alleged by the husband is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England.' See also Scrimshire v. Scrimshire, 2 Hagg. Con. 395; Connelly v. Connelly, 2 Eng. L. & E. 570. 'The English courts,' says Mr. Justice Story, 'seem not to be disposed to admit that any valid sentence of divorce can be pronounced, in any foreign country, which shall amount to the dissolution of a marriage celebrated in England, between English subjects, at least so far as such a divorce is to have any force or operation in England. At the same time, it may be remarked that the doctrine so apparently held has undergone very elaborate discussions at a very recent period; and the grounds upon which it rests have been greatly shaken. Warrender v. Warrender, 9 Bligh, 89; s. c. 2 Clark & F. 488. Story, Confl. Laws, § 595. See also ib. §§ 215–230, and cases considered; Dolphin v. Robins, 7 H. L. Cas. 390; Shaw v. Gould, L. R. 3 H. L. 55. The position has, however, finally been abandoned that a foreign court cannot dissolve an English marriage. Harvey v. Farnie, 6 P. D. 35, 44; s. c. 8 App. Cas. 43; Story, Confl. Laws, p. 312, note, 8th ed. In regard to the requisites to the jurisdiction of the courts of one state to pronounce a decree of divorce between parties married in another state, see Kerr v. Kerr, 41 N. Y. 272, and cases infra.

[2] Of course the decree can have no binding effect out of the state unless the defendant, if not domiciled there, was served with process within the state, or appeared generally for defence. People v. Baker, 76 N. Y. 78; Kinnier v. Kinnier, 45 N. Y. 535; Hunt v. Hunt, 72 N. Y. 217; Van Fossen v. State, 37 Ohio St. 317; Sewall v. Sewall, 122 Mass. 156; People v. Dawell, 25 Mich. 247; Crane v. Maginnis, 1 Gill & J. 463.

no citation of authority to show that if the parties were bona fide residents of the state in which the divorce was granted, having their true domicil there, the decree will be respected in other states. But in several of the states statutes have been passed providing in effect that where a party removes to another state or country *for the purpose* of getting such a residence there as to enable him or her to sue for a divorce, no decree granting divorce will be binding; and these statutes have often been enforced.[1] Perhaps the same rule would be held by the courts where there was no such statute, on the ground that jurisdiction cannot be acquired by fraud.[2]

It is also established both in America and in England that the sentences and decrees of the Probate Courts, within their jurisdiction, upon the admissibility of an instrument to probate, and the title derived from issuance of letters testamentary and of administration, are absolutely unimpeachable in all other courts, whether of law or of equity,[3] as we have seen to be the case in regard to determinations of the domestic courts. It cannot, therefore, be collaterally shown that another person was appointed executor, or that the will was a forgery.[4] The judgment establishes also the fact that the will was executed according to the law of the country in which the testator was domiciled; but it is not conclusive of the collateral fact of the testator's actual domicil,[5] though there was a finding thereon.[6] Nor does it show, except between the actually litigating or fully represented par-

[1] Van Fossen *v.* State, 37 Ohio St. 317; Smith *v.* Smith, 13 Gray, 209; Sewall *v.* Sewall, 122 Mass. 156; Loud *v.* Loud, 129 Mass. 14, 18; Cheever *v.* Wilson, 9 Wall. 108; Burlen *v.* Shannon, 99 Mass. 200; Story, Confl. Laws, p. 308, note, 8th ed.

[2] See Van Fossen *v.* State, 37 Ohio St. 317.

[3] Nelson *v.* Oldfield, 2 Vern. 76; Williams *v.* Saunders, 5 Cold. 60; Tompkins *v.* Tompkins, 1 Story, 547; and comp. Whicker *v.* Hume, 7 H. L. Cas. 124, 143; De Mora *v.* Concha, 29 Ch. D. 268, 300, C. A.

[4] Ibid. See also Smith *v.* Fenner, 1 Gall. 171; Spencer *v.* Spencer, ib. 623; Bogardus *v.* Clarke, 1 Ed. Ch. 266; Dublin *v.* Chadbourne, 16 Mass. 433, 441; Laughton *v.* Atkins, 1 Pick. 535; Crusoe *v.* Butler, 36 Miss. 150; Townsend *v.* Moore, 8 Jones, 147; Clark *v.* Dew, 1 Russ. & M. 103; Montgomery *v.* Clark, 2 Atk. 378; Allen *v.* Dundas, 3 T. R. 125; Ex parte Jolliffe, 8 Beav. 168; Archer *v.* Mosse, 2 Vern. 8; Nelson *v.* Oldfield, ib. 76; Plume *v.* Beale, 1 P. W. 388.

[5] Whicker *v.* Hume, 7 H. L. Cas. 124; De Mora *v.* Concha, 29 Ch. D. 268, affirmed on appeal nom. Concha *v.* Concha, 11 App. Cas. 541.

[6] Concha *v.* Concha, supra.

ties, that the testator was possessed of mental capacity to make the will.[1]

Sales of wreck and derelict under municipal regulations fall within the same rule. In the case of Grant *v.* McLachlin[2] an American vessel was captured by a French privateer and carried into a Spanish port; but it appeared that the Spanish authorities refused to take any steps for the condemnation of the vessel. It was subsequently put in requisition by the French government, sent to Baracoa in Cuba, and there dismantled and abandoned. The defendant purchased the wreck some six months later under a sale by the Spanish commissary at Baracoa, raised and repaired it, and took the ship to New York, when the original owner brought the present action of trover to recover it. The court held that as the vessel had been abandoned as a wreck, and as it had been sold according to the laws of Spain, the property was transferred to the purchaser, and his title became good against the world. Mr. Justice Thompson said that the capture was no doubt illegal, and that as the captors had not obtained any judicial condemnation, the plaintiff's title was not lost by the piratical proceedings thus far. But the subsequent proceedings were fair and according to law; and whether the property had been previously acquired by piracy or not he did not deem material.[3]

[1] Brigham *v.* Fayerweather, 140 Mass. 411. In regard to the executor's representing legatees, see De Mora *v.* Concha, 29 Ch. D. 268; s. c. Concha *v.* Concha, 11 App. Cas. 541; ante, p. 230.

[2] 4 Johns. 34.

[3] 'Goods taken from pirates,' he continued, 'and belonging to others, will under the English law be taken and sold by government if the owner comes not within a reasonable time to vindicate his property. What that reasonable time shall be every government will determine for itself. A sale according to the law of the place where the property is must vest a title in the purchaser which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize. . . . This is not a case of prize, or title founded on capture. Such cases are governed by different rules, and must be tested by the law of nations. The sale in this case was a proceeding under a municipal regulation, and every government prescribes its own rules relative to wrecks and property left derelict. By the English law vessels cast on shore and abandoned, and not reclaimed within a year, are to be sold by a public officer, and the proceeds placed in the hands of the government. We have a similar statute in this state; and I believe it was never doubted but that the purchaser would obtain a valid title, which would be everywhere respected.' See The Tilton, 5 Mason, 465.

These cases are sufficient to show that the sentences or decrees of foreign courts of competent jurisdiction proceeding in rem are conclusive against all persons of the merits of the question — the status or title — in issue, so far as they clearly appear to have been tried; and this too though they are plainly erroneous.[1] On the other hand, it is certain that an adjudication of a foreign (like that of a domestic) court is conclusive only of matters without which the judgment could not have been pronounced.[2]

In the case first cited Shattuck filed a libel on the instance side of the District Court of the United States, alleging that Maley, while in command of a public armed vessel of the United States, took possession of a schooner and cargo, in violation of the law of nations, belonging to the libellant, a Danish subject; that he put on board a prize crew who carried the vessel to parts unknown; and that they had not brought the same to adjudication in any Court of Admiralty. The libel then prayed for monition to proceed to adjudication, or, in default thereof, for restitution in value, with damages. Maley admitted the seizure, but justified it on the ground that there was probable cause in that the vessel was violating an act to suspend commercial intercourse between the United States and France. He also alleged that after the seizure the vessel and cargo were captured by a British war vessel, carried to Jamaica, and libelled and condemned in the Vice-Admiralty Court there as French or Spanish property. Maley relied on this decree as establishing the fact conclusively that the vessel and cargo were not Danish property. The Supreme Court of the United States held that the sentence of condemnation of a vessel as enemy property was

[1] See also Castrique *v.* Imrie, L. R. 4 H. L. 414 (proceeding in a foreign admiralty court establishing a maritime lien): Story, Confl. Laws, p. 814, note, 8th ed.; Monroe *v.* Douglas, 4 Sandf. Ch. 126; Denison *v.* Hyde, 6 Conn. 508; Townsend *v.* Moore, 8 Jones, 147; Calvert *v.* Bovill, 7 T. R. 523; Christie *v.* Secretan, 8 T. R. 192.

[2] Maley *v.* Shattuck, 3 Cranch, 458; Burlen *v.* Shannon, 99 Mass. 200; De Mora *v.* Concha, 29 Ch. D. 268; s. c. Concha *v.* Concha, 11 App. Cas. 541, one of the most striking and instructive examples to be found; the finding of a *domestic* court of a foreigner's domicil being held by the Court of Appeal not conclusive upon third persons. The masterly judgment in Brigham *v.* Fayerweather, 140 Mass. 411, goes still further, it will be seen.

not conclusive of its nationality; it being entirely consistent with such sentence that the vessel was in fact the property of a neutral. The nationality of the vessel was not a matter essential to the adjudication; and there was no estoppel to show the real fact.[1]

We must here carefully observe the distinction between this class of cases and that represented by Croudson *v.* Leonard, already referred to; in which, it will be remembered, it was held that a sentence of condemnation was conclusive of the fact upon which it proceeded, in that case the breach of blockade. The class of cases of which Maley *v.* Shattuck is a representative decide, not that the sentence is inconclusive of the fact upon which it proceeded, — not, for example, that the sentence may be falsified about the breach of blockade, or the resistance to search, — but that the sentence shall not work an estoppel upon a matter not essential to the adjudication, as, for example, the nationality of the vessel.[2] The matter of the breach of blockade, or of the resistance to search, or, in general, of breach of neutrality, is vital to the sentence of condemnation; such a sentence could not have been declared without proof of such facts. But it is not necessary to the sentence that the vessel, in point of fact, belonged to the nation with which the captor is at war; it is merely a conclusion or an inference of international law that a ship which is seeking to break a blockade, to use the most familiar example, belongs to the enemy. It is, indeed, in one sense enemy property, in this, that it is an act of hostility to attempt to break a blockade, so far as the particular vessel is concerned. That vessel has arrayed itself in hostility to the blockading force; in this sense it is properly condemned as enemy property.

[1] Chief Justice Marshall, in delivering the opinion, said: 'It is well known that a vessel libelled as enemy's property is condemned as prize if she act in such a manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war as exercised by belligerents authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is in truth the vessel of a friend. Of consequence this sentence, being only conclusive as to its own correctness, leaves the fact of real title open to investigation.'

[2] Concha *v.* Concha, 11 App. Cas. 541. The contrary doctrine in Bernardi *v.* Motteux, 2 Doug. 574, — and see Hughes *v.* Cornelius, 2 Show. 232, note, — is now overruled.

Further, foreign judgments in rem raise no estoppel concerning findings stated obscurely or with ambiguity;[1] there is no presumption or anything else to help even a domestic judgment in such a case. In the case just cited the record of proceedings contained no allegation of an offence in the nature of a libel (the judgment having been in admiralty); and for this reason the court held that the sentence was not an estoppel. The case of Christie *v.* Secretan,[2] an action upon a policy of insurance on a vessel captured and condemned as prize, also raised a question of this sort. The defence was that the ship was lost by the negligence of the owner in not having on board the rôle d'équipage, and that she was condemned on this ground. Mr. Justice Grose said that it was indeed necessary that the ship should have such papers, to hold the insurer liable; and that if the ship had been condemned for the want of such papers, it would have been conclusive against the owner. In regard to the sentence of condemnation he said that they could only look at the ground of it, and not at any of the previous reasons stated. The express ground was that the ship belonged to the enemies of France, and that did not negative any fact or circumstance that the plaintiff was bound to prove in order to maintain his action.[3] The concluding portion of the French sentence was to this effect: The tribunal 'likewise adjudges and declares the validity of the prize of the goods and effects, whereof the lading and cargo of the said ship Mercury consists; and all that for want

[1] Upon this point Mr. Justice Story remarks (Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600): 'I do not understand that in construing a foreign sentence which is to be held conclusive in rem as to the facts and grounds of the sentence stated therein, this court is bound to make out such facts and grounds by argument and inference and conjecture. The facts and grounds ought to appear ex directo in order to estop the parties in interest from denying or questioning them. I agree with the doctrine of Lord Ellenborough, in Fisher *v.* Ogle, 1 Camp. 418, that courts of justice are not bound to fish out a meaning, when sentences of this sort are produced before them. Whatever points the sentence professes ex directo to decide they are bound to respect and admit to be conclusive. But if the sentence be ambiguous, or indeterminate, as to the facts on which it proceeds, or as to the direct ground of condemnation, the sentence ought not to be held conclusive, or the courts of other countries put to the task of picking out the threads of argument, or of reasoning or recital, in order to weave them together so as to give force or consistency or validity to the sentence.'

[2] 8 T. R. 192.

[3] See Calvert *v.* Bovill, 7 T. R. 523.

of the despatches and sea-papers of the said captain being in regular order; on which account she is looked upon as belonging to the enemies of the French Republic.'

In Robinson *v.* Jones[1] the record of the sentence was held ambiguous. It declared that the court 'pronounced the said vessel called The Franklin, and her lading, to have been unlawfully rescued and retaken by the master from the possession of the prize-master, and others put on board thereof from his Majesty's sloop-of-war . . . whilst proceeding to a British port for adjudication, and as such, *or otherwise*, subject and liable to confiscation.' The ambiguity lay in the words in italics; and these words destroyed the sentence as an estoppel.[2] Nor could parol evidence be admitted to show what was in fact decided. Evidence is often received to show the real issue upon which a judgment or verdict proceeded in a question of identity between matters in dispute in two actions, but not, perhaps, to prove a specific verdict from a record ambiguous on its face. In other words, parol evidence cannot be received to explain a patent ambiguity in a judgment. The language itself implies that there was no definitive decision of the particular point.[3]

The jurisdiction of the court may be called in question. In order to give a foreign judgment any force extra territoriam it

[1] 8 Mass. 536.

[2] Mr. Chief Justice Parsons distinguishes this case from that of Baxter *v.* New England Ins. Co., 6 Mass. 277. He said that the decree in that case, 'after having expressly and distinctly alleged that the vessel had violated a blockade de facto by egress, proceeds to allege that for that, *and other sufficient causes*, she was condemned. Here was not only a direct assertion that a blockade had been violated, but also that the violation was a cause of the condemnation; and this being a sufficient cause by the law of nations, it was immaterial whether any other causes existed or not. But the present decree after alleging a rescue declares that for such cause, or otherwise, the vessel is liable to condemnation. Now we know no rule of construction by which it can be maintained that these words amount to a direct allegation that the rescue was even one of the final causes of the condemnation. There had been, as appears from the decree, an inquiry relative to the violation of the blockade of the West India Islands, with respect to which perhaps the judge was not fully satisfied. Admit that he was fully satisfied that a rescue had actually taken place; yet he might not hold himself obliged under all circumstances to condemn expressly for that cause. The natural construction of the phraseology is that as the vessel had been rescued she was liable to condemnation for that cause, *or* for some other cause not stated. Now, this is far from being a direct unequivocal assertion that she is condemned because she has been rescued.'

[3] But comp. ante, p. 87.

must be made to appear that the court which pronounced the judgment had lawful jurisdiction over the cause, over the res, and over the parties.[1]

If the record does not show any monition, or any hearing, or that the formalities of law had been gone through, the judgment will not be even prima facie evidence.[2] And when the record of a foreign judgment in rem is silent in regard to the matters which constitute jurisdiction, jurisdiction will not be presumed.[3]

[1] Story, Confl. Laws, § 586. See The Mecca, 6 P. D. 106, reversing 5 P. D. 28; The Flad Oyen, 1 Ch. Rob. 135; The Henrick & Maria, 4 Ch. Rob. 43; 1 Parsons, Ship. & Adm. 77, and cases cited. This subject came under consideration in an early case in the Supreme Court of the United States. Rose v. Himely, 4 Cranch, 241, 269. In delivering the opinion of the court Marshall, C. J. said: 'The power under which it [the foreign court] acts must be looked into, and its authority to decide questions which it professes to decide, must be considered. But although the general power by which a court takes jurisdiction of causes must be inspected in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war the authority of the tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of that court also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn as prize of war a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that to a certain extent the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence. Passing from principle to authority we find that in the courts of England, whose decisions are particularly mentioned because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide is uniformly qualified with the limitation that it has in the given case jurisdiction of the subject-matter.' The Flad Oyen, 1 Ch. Rob. 135, and other cases.

[2] Sawyer v. Maine Ins. Co., 12 Mass. 291; Bradstreet v. Neptune Ins. Co., 3 Sum. 600.

[3] Commonwealth v. Blood, 97 Mass. 538; The Griefswald, Swabey, 430.

This work does not profess to deal with what constitutes jurisdiction; if

In Commonwealth *v.* Blood this was held to be true of a judgment rendered in another of our American states by a court of record in a divorce case; the record showing that the libellee resided in another state, and not showing any service of process upon her. The court declared that the jurisdiction of the foreign court over the subject-matter was a special authority not recognized by the common law, and that its proceedings therefore stood on the same footing with those of courts of limited and inferior jurisdiction.[1]

Though the jurisdiction, however, may ordinarily be inquired into, it is possible that if there has been a direct adjudication of the matter, on appearance and contest, this may be conclusive; it has been so decided in actions in personam.[2] This, however, would be true only where the question of jurisdiction (the parties being before the court) related to the subject-matter of the suit, or to the validity of the notice to the defendant as a *resident* of the state. An adjudication of jurisdiction over a non-resident who had not been served with notice within the state, and had not appeared, or had appeared only to test the question of jurisdiction,[3] could not be conclusive; and this too though jurisdiction had been acquired over property of the defendant. The fact that the defendant's property may have been sold under orders of the court (e. g. to satisfy a decree for alimony), and a good title conveyed, would not make the judgment binding extra territoriam except of the change of title to the property so sold.[4]

the reader desires to pursue the inquiry, he is referred to the following authorities: Dodd *v.* Una, 40 N. J. Eq. 672; School Trustees *v.* Stocker, 13 Vroom, 116; Hudson *v.* Guestier, 4 Cranch, 293; s. c. 6 Cranch, 281; The Mary, 9 Cranch, 126; The Tilton, 5 Mason, 465; Reid *v.* Darby, 10 East, 143; Hunter *v.* Prinsep, ib. 378; 1 Parsons, Ship. & Adm. 75–78, and cases cited. If the foreign court had jurisdiction when the suit was begun, it will be presumed, in the absence of evidence to the contrary, that it had jurisdiction to the end. Lockhart *v.* Locke, 42 Ark. 17.

[1] See also Burlen *v.* Shannon, 99 Mass. 200. The same rule was in Barringer *v.* King, 5 Gray, 9, 11, intimated to be true of the record of a judgment rendered by the Supreme Court of another state in an action of contract against a resident of Massachusetts.

[2] Gunn *v.* Howell, 35 Ala. 144; Wyatt *v.* Rambo, 29 Ala. 510; Hudson *v.* Guestier, 6 Cranch, 281, 284; Grignon *v.* Astor, 2 How. 319, 340. See ante, pp. 206, 207.

[3] Walling *v.* Beers, 120 Mass. 548. See next chapter.

[4] Personal judgment, without service or appearance, against a foreigner will not be enforced as a judgment in

The parties are not estopped to show the want of authority in the foreign tribunal to sit as a court;[1] at least, the party who did not institute the proceedings there is not thus estopped. But the presumption generally is that the tribunal was a legitimate one.[2] In the case of The Flad Oyen, just cited, the English Court of Admiralty held that the authority of a French consul, sitting as a judge in admiralty in Norway, under a French commission, would not be recognized.[3] And in Snell *v.* Faussatt the court said that when the constitution of a foreign court was not known, it would be presumed to be a legal one; but when the source of its authority and constitution was stated, the matter ought to be examined; and if it was contrary to the usual manner of constituting courts, the burden of proof was shifted upon the party who would support the decree. Thus, it was not usual for courts to be constituted by a military commander; and since it appeared that the court in question had been so established, the presumption of legality did not arise.

In the case of The Griefswald, just cited, the vessel of a British subject had been injured in Turkish waters by collision with a Prussian ship; whereupon he applied to the British consul to request the Prussian authorities there to detain the offending vessel for satisfaction. The master of the Prussian vessel soon after this applied to the Prussian legation to have a mixed court appointed to adjudicate the matter; but the British consul refused to take part in the matter, saying that he was not in a position to recognize the acts and proceedings proposed. The Prussian legation then proceeded to constitute a tribunal for trying the cause without any participation or recognition by the English authorities, so far as it appeared from the transcript of the proceedings, and after the injured party had departed with his vessel. The case was tried without notice or appearance, and the complaint of the British subject was dismissed. In an action by him for the same injury in an English Vice-Admiralty

rem, though no distinction is made in the foreign country between such judgments. The Mecca, 6 P. D. 106, reversing 5 P. D. 23.

[1] Snell *v.* Faussatt, 1 Wash. C. C. 271; The Griefswald, Swabey, 430; The Henrick & Maria, 4 Ch. Rob. 43; The Flad Oyen, 1 Ch. Rob. 135; 1 Parsons, Ship. & Adm. 77, and cases cited.

[2] Snell *v.* Faussatt, supra.

[3] The Kierlighett, 3 Ch. Rob. 96. See The Christopher, 2 Ch. Rob. 209.

Court it was held that the decree just mentioned, in favor of the Prussian, was no estoppel, in the absence of proof that the court had jurisdiction by treaty, usage, or voluntary submission.

A foreign judgment in rem may also be impeached for fraud practised at the trial upon the person against whom the judgment is pleaded. Whether this means that a party may show that a fact decided was so decided either by reason of false or perjured testimony, or by reason of suppression of evidence, is not clear; though it is clear that any judgment fraudulently obtained in any other way than as a result of a consideration by the court of the very question of fraud would be open to collateral impeachment. High authority may be cited, in regard to judgments in personam of foreign countries, to the effect that fraud of the former kind, i. e. the production of false evidence or the suppression of evidence, will not afford ground for impeaching the judgment;[1] but this in turn has also been denied by high authority and the contrary actually decided.[2] We can-

[1] Flower *v.* Lloyd, 10 Ch. D. 327, 333, by James and Thesiger, L. JJ. in the Court of Appeal; Castrique *v.* Behrens, 30 L. J. Q. B. 163; s. c. 2 El. & E. 709; Field and Hoffman, JJ. in United States *v.* Flint, 1 Bigelow, Fraud, 88, note. See Magoun *v.* New Eng. Ins. Co., 1 Story, 157, 167; Hood *v.* Hood, 11 Allen, 196; 110 Mass. 463; 2 Story's Equity, pp. 873, 876, 13th ed. In Castrique *v.* Behrens, supra, Crompton, J. for the Queen's Bench said: 'It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment in rem can only be obtained if the holder of the bill of exchange be a French subject, and bona fide holds for value; and we must take it as admitted on this demurrer that Troteaux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants, falsely represented to the French courts that he was holder for value, when he was not. It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceedings were such that the plaintiff had no opportunity to appear in the French court and dispute the allegations. In the present case it is quite consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French court, intervened, and was heard, and that the very question whether Troteaux was a holder for value was then decided against him. We think, on the principle laid down in Bank of Australasia *v.* Nias, 16 Q. B. 717, that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained.' This case was not before the court in Abouloff *v.* Oppenheimer, infra.

[2] Abouloff *v.* Oppenheimer, 10 Q. B. D. 295, C. A.; Hunt *v.* Hunt, 72 N. Y. 217, 227 (dictum). See Ochsenbein *v.* Papelier, L. R. 8 Ch. 695; Price *v.* Dewhurst, 8 Sim. 279, 302.

In Abouloff *v.* Oppenheimer a distinction is taken between the court's

not but think that the view first stated is the better.[1] It is so settled with regard to judgments of courts of our sister states.[2]

being misled and being mistaken (comp. the case of a perverse disregard by a foreign court of the law of the country which should govern. Simpson *v.* Fogo, 1 Hem. & M. 195; Liverpool Credit Co. *v.* Hunter, L. R. 3 Ch. 479, 484; Castrique *v.* Imrie, L. R. 4 H. L. 414); that distinction being based upon the ground that where the foreign court has been misled by a party, to allow him the benefit of the judgment would be to allow him to take advantage of his own wrong. But that is equally true where the foreign court was only mistaken; for now the mistake is discovered (by the domestic court), and still the party in whose favor it was made is seeking to press his advantage. That cannot be any better than the other case. Comp. Redgrave *v.* Hurd, 20 Ch. D. 1; Arkwright *v.* Newbold, 17 Ch. D. 301, 320; 1 Story, Equity, p. 210, note, 13th ed.; cases in regard to innocent misrepresentations sought to be enforced.

[1] Christmas *v.* Russell, 5 Wall. 290; post, Foreign Judgments in Personam.

[2] Ibid.

CHAPTER VI.

FOREIGN JUDGMENTS IN PERSONAM.

§ 1. *Historical View of the Subject.*

We proceed next to the consideration of foreign judgments in personam. And first, of foreign judgments strictly so called, and judgments rendered in the colonies and provinces of England. The two classes will be considered together, for the reason that the courts have not practically distinguished between them; though grounds for a distinction have been suggested in several cases, as will be seen.

We call attention now to the cases in historical order, by which it will appear that for many years there was much fluctuation in the decisions concerning the effect to be given the judgments of tribunals of foreign countries: the courts at one time considering them as prima facie evidence only, and liable to be overturned by countervailing proof; then advancing and holding them conclusive of the matters adjudicated, and again receding to the former position; until finally, when the precise point presented itself for earnest consideration, they declared a settled rule in favor of the conclusiveness of these judgments. We shall see also that this step was finally taken in England considerably earlier than in America; and that some of our courts still hesitate to take it.

One of the most familiar cases upon this subject is Walker *v.* Witter.[1] That was an action in the King's Bench in 1778 upon a judgment rendered in the Supreme Court of Jamaica. The defendant, besides nil debet, pleaded nul tiel record; the plaintiffs having declared 'prout patet per recordam.' Issue of fact was joined upon the first plea, and a verdict was given for the plaintiffs. To the plea of nul tiel record the plaintiffs replied

[1] 1 Doug. 1.

that there was such a record, which they were ready to verify by production. Counsel for the defendant, apparently on a motion in arrest of judgment on the verdict upon the first plea, contended that an action of debt could not be maintained on a foreign judgment; or if it could, that the consideration of the judgment should be shown. For the plaintiffs it was argued that where indebitatus assumpsit would lie, debt could be maintained, citing Crawford *v.* Whittal.[1] Counsel said that it was also determined in that case that the judgment of itself was prima facie evidence of the debt, and that therefore the plaintiffs were not bound to allege the consideration. The question whether the other plea was good was also argued by both sides. Lord Mansfield said that the plea of nul tiel record was improper; and that though the plaintiffs had called the judgment a record, it was clear that they did not mean that sort of record to which implicit faith was given by the courts of Westminster Hall. The question, he said, was brought to a narrow point, for it was admitted on the part of the defendant that indebitatus assumpsit would have lain, and on the part of the plaintiffs that the judgment was only prima facie evidence. This being the case, debt was a proper action. He thus decided the only points in the case; but he then added obiter that though foreign judgments were good grounds of action, still they were examinable on the merits; and among other cases he referred to one in which he said Lord Hardwicke had thought himself entitled to examine into the justice of a decision of the House of Lords because the original decree was rendered in a court in Wales.[2] The other judges agreed with Lord Mansfield. It will be observed, however, that the question was not raised in the case whether foreign judgments were conclusive; the plaintiffs only insisting that they were prima facie evidence, as this was sufficient for their case.

In Galbraith *v.* Neville[3] the question arose (after verdict for the plaintiff) upon a rule to show cause why there should not be a new trial. Lord Kenyon there said: 'I cannot help enter-

[1] H. 13 Geo. 3, B. R.

[2] 1 Eq. Cas. Ab. 83, pl. 3; Isquierdo *v.* Forbes, H. 24 Geo. 3, B. R.

[3] 1 Doug. 5, note.

taining very serious doubts concerning the doctrine of Walker *v.* Witter that foreign judgments are not binding on the parties here. But when I am told that Lord Hardwicke did not hold himself bound by a decree on the chancery side of the Court of Great Sessions in Wales, affirmed in the House of Lords, I own I am quite lost in a maze.' Mr. Justice Buller, however, in the same case, approved the doctrine of Lord Mansfield in Walker *v.* Witter, saying that he had often heard that eminent jurist repeat what was said by Lord Hardwicke in the case alluded to, and that this was the ground of his lordship's opinion: 'When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong.' The same view was entertained by Chief Justice Eyre in Phillips *v.* Hunter.[1]

A case before Lord Chief Justice Best in 1826[2] has often been cited as sustaining the doctrine that foreign judgments are conclusive; but it is not a direct authority for that position. All that his lordship held was that such judgments were at all events prima facie ground of actions; and he expressly stated that it was not necessary to decide whether the judgment pronounced could be impeached on the merits.

The next case which entertains the doctrine of Lord Mansfield in Walker *v.* Witter was decided in the House of Lords in 1834.[3] In this case a bill had been filed in Ireland to enforce a decree of the Court of Chancery in England; the bill was dismissed for want of jurisdiction, and of course the court of Ireland did not entertain the question of the conclusiveness of the English decree. The only point, therefore, that could be decided

[1] 2 H. Black. 403, 411. 'It is in one way only,' he said, 'that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory; not as conclusive, but as matter in pais, as consideration prima facie sufficient to raise a promise. We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law.' Comp. the rule ante, pp. 102, 103.

[2] Arnott *v.* Redfern, 3 Bing. 353.

[3] Houlditch *v.* Donegal, 8 Bligh, N. S. 301.

on the appeal to the House of Lords was whether the court in Ireland had erred in refusing to entertain the bill. The decree was reversed; the lord chancellor holding, on the authority of Martin *v.* Nicolls,[1] that a foreign decree may well be the ground of a bill in another court. But in the course of his opinion he took occasion to express his views very decidedly in favor of the doctrine that the judgments of the courts of other countries were only prima facie evidence of debt, and might be reopened in a suit to carry them into effect at home; and this, he contended, was eminently proper where it appeared that the law of the foreign country was inconsistent with that of England. And he cited Buchanan *v.* Rucker[2] in illustration of this point, where the court refused to enforce a foreign judgment against a party residing in England who upon the face of the proceedings appeared only to have been summoned 'by nailing up a copy of the declaration at the court-house door.'

Don *v.* Lippman[3] in the House of Lords is a later case in which the language of Lord Brougham is much to the same effect; but the fact was that the defendant in that case was a subject of Scotland, while the judgment against him was rendered in France, and the action was begun and ended in his absence, the only citation being by 'the affixing of notice in a public office,' in accordance with a form known in the French courts. Lord Brougham said the case was 'stronger than that of the defendant in Buchanan *v.* Rucker, and he must have the same principle applied to it.' The language of the court in Douglas *v.* Forrest,[4] quoted by Lord Brougham, which was an action in an English court on a Scotch judgment of horning against a Scotchman born, is to the same effect.

But these cases do not decide that the merits of a valid foreign judgment may be inquired into; they merely hold that the judgment will not be enforced if it appear that the foreign court had not acquired jurisdiction of the case. Of this more at length in a subsequent part of this chapter. These are all the English cases of importance which favor the rule that the judgments of courts of other countries are inconclusive; and it will be

[1] 3 Sim. 458.
[2] 1 Camp. 63; s. c. 9 East, 192.
[3] 5 Clark & F. 1.
[4] 4 Bing. 686.

observed that in none of them is there an express and authoritative adjudication of the point.

On the other side, among the early cases affirming the conclusiveness of foreign judgments, we have the language of Lord Kenyon, above quoted, in Galbraith *v.* Neville; of Lord Ellenborough, in Tarleton *v.* Tarleton;[1] of Lord Hardwicke, in Boucher *v.* Lawson;[2] and of Lord Chancellor King, in Burroughs *v.* Jamineau.[3] Gold *v.* Canham[4] also proceeds upon this view; and the later case of Martin *v.* Nicolls[5] is a direct authority that the judgments of colonial courts cannot be questioned.

Coming down to a still later period, we find Lord Denman in two cases, one in the year 1839,[6] the other in the year 1844,[7] supporting the same side of the question. In the second case he very clearly intimated that a plea to an action upon a colonial judgment ought to steer clear of an inquiry into the merits. 'For,' he added, 'whatever constituted a defence in that court ought to have been pleaded there.' But the doctrine of Lord Mansfield in Walker *v.* Witter was directly impugned in the recent case of Bank of Australasia *v.* Nias,[8] and the rule adjudged that a plea to the merits in a suit upon a colonial judgment otherwise valid was bad; and this case has settled the law of England.[9]

The action in that case was upon a colonial judgment; and whether the same conclusiveness should be accorded to judgments rendered in foreign countries, from which no appeal lies to any English court, was not and could not have been decided. Lord Campbell expressly refrained from giving an opinion upon the point. There had never been an authoritative decision of the question prior to the year 1862, though many dicta are to be found among the cases to the effect that they are only prima facie ground of suit. Several of the cases have been already

[1] 4 Maule & S. 20.
[2] Cas. temp. Hardw. 85, 89.
[3] Mosely, 1.
[4] 1 Cas. in Ch. 311; also reported in note to Kennedy *v.* Cassillis, 2 Swanst. 313, 325.
[5] 3 Sim. 458.
[6] Ferguson *v.* Mahon, 11 Ad. & E. 179.
[7] Henderson *v.* Henderson, 6 Q. B. 288.
[8] 16 Q. B. 717.
[9] De Cosse Brissac *v.* Rathbone, 6 Hurl. & N. 301; Scott *v.* Pilkington, 2 Best & S. 11; Vanquelin *v.* Bouard, 15 C. B. N. S. 341.

referred to. In that year the important case of Scott *v.* Pilkington [1] was tried in the Court of Queen's Bench, — an action upon a judgment rendered in New York. The distinction, however, which Lord Campbell suggested between the conclusiveness of colonial and foreign judgments (that in the former case an appeal lies to the Privy Council) does not seem to have been presented to the court; at any rate, it was unnoticed. The court, by its Chief Justice, said: 'It was not denied that since the decision in the case of The Bank of Australasia *v.* Nias we were bound to hold that a judgment of a foreign court having jurisdiction over the subject-matter could not be questioned on the ground that the foreign court had mistaken their own law, or had come on the evidence to an erroneous conclusion as to the facts.' So that it appears that counsel failed to call the attention of the court to the supposed distinction; and the court without hesitation gave an effect to the decision of Lord Campbell which he himself declined to give to it. The question, however, must be regarded as settled in the English courts by this case. The rule in the case referred to went, indeed, a step further, and declared that though as in that case an appeal be actually pending upon the judgment of the foreign court, this should be no bar to the action in England; although it was said that it might afford ground for the equitable interposition of the English court to prevent the possible abuse of its process, and on proper terms to stay execution.[2]

The result, then, finally reached in the courts of England is that foreign judgments, strictly so called, and colonial judgments stand in the same category and on a perfect equality so far as the matter of conclusiveness is concerned; in either case any plea which goes to the merits of the action upon which the judgment was rendered, whether impeaching the ruling upon the law or the decision upon the facts,[3] is bad, — provided the judgment was not otherwise subject to impeachment.[4] But of

[1] 2 Best & S. 11.

[2] See Taylor *v.* Shew, 39 Cal. 536.

[3] It matters not that all the facts were not before the court. De Cosse Brissac *v.* Rathbone, 6 Hurl. & N. 301; In re Trufort, 36 Ch. D. 600, Stirling, J.

[4] See also Crawley *v.* Isaacs, 16 Law T. N. S. 529; Doglioni *v.* Crispin, L. R. 1 H. L. 301; Barber *v.* Lamb, 8 C. B. N. S. 95; Robertson *v.* Struth, 5 Q. B. 941; Hamilton *v.* Dutch East India Co., 8 Bro. P. C. 264; Becquet *v.* MacCar-

course a foreign judgment could not have greater effect than it would have where rendered; and therefore it is always proper to inquire into the effect of the judgment in the foreign country. If it would not there constitute a res judicata, it cannot elsewhere.[1]

The subject has again come under review by the Court of Queen's Bench, but in a somewhat different form.[2] The question raised in Godard *v.* Gray was whether a judgment rendered in France upon an English contract, the record of which showed on its face that the law of England had been mistaken and so misapplied, was conclusive when sued upon in an English court. The court decided the question in the affirmative; taking occasion to reaffirm also the doctrine of the late cases above presented.[3] And this is considered to have settled the law.[4]

thy, 2 Barn. & Ad. 951; Burrows *v.* Jemino, 2 Strange, 733; Ferguson *v.* Mahon, 11 Ad. & E. 179; Ricardo *v.* Garcino, 12 Clark & F. 368; Bank of Australasia *v.* Hardin, 9 C. B. 661; Cammell *v.* Sewell, 3 Hurl. & N. 617; s. c. in error, 5 Hurl. & N. 728; Kersall *v.* Marshall, 1 C. B. N. S. 241; General Nav. Co. *v.* Guillou, 11 Mees. & W. 877; Frayes *v.* Worms, 10 C. B. N. S. 149; Simpson *v.* Fogo, 1 Hem. & M. 195; Obicini *v.* Bligh, 8 Bing. 335.

[1] Nouvion *v.* Freeman, 37 Ch. D. 244, C. A. reversing 35 Ch. D. 704, on the effect of the judgment in the foreign country.

[2] Godard *v.* Gray, L. R. 6 Q. B. 139. See ante, p. 242; Imrie *v.* Castrique, 8 C. B. N. S. 405, 417; Castrique *v.* Imrie, L. R. 4 H. L. 414, 437; Simpson *v.* Fogo, 29 L. J. Ch. 657; s. c. 32 L. J. Ch. 249, and 1 Hem. & M. 195; Dent *v.* Smith, L. R. 4 Q. B. 414. So in regard to judgments rendered in courts of our sister states. Richards *v.* Barlow, 140 Mass. 218, 221.

[3] Mr. Justice Blackburn, who spoke for the majority, said: 'It is broadly laid down by the very learned author of Smith's Leading Cases, in the original note to Doe *v.* Oliver, Smith L. C. 2d ed., at p. 448, that it is clear that if the judgment appear on the face of the proceedings to be founded on a *mistaken notion* of the English law, it would not be conclusive. For this he cites Novelli *v.* Rossi, 2 Barn. & Ad. 757, which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight, and accordingly it has been treated with respect. In Scott *v.* Pilkington, 2 Best & S. 11, 42, the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position, and state it thus: "If the judgment be founded on an *incorrect* view of the English law, *knowingly or perversely acted on.*" The doctrine thus qualified does not apply to the present case; and there is therefore no need to inquire how far it is accurate.

[4] Nouvion *v.* Freeman, 37 Ch. D. 244, C. A.; In re Trufort, 36 Ch. D. 600.

What the effect might have been of a perverse disregard of the governing law, whether the law of England[1] or of another country,[2] was not considered; though there are indications that that would be a different case if it should ever arise.[3] Indeed, the view taken in Godard *v.* Gray in regard to error apparent on the very record of the proceedings was not readily accepted;[4] though that case appears to have adopted the true rule. To permit error apparent, whether of fact or of law, if not perverse, to furnish ground for impeaching the judgment is much like abandoning the firm ground of the modern authorities; for it is hard to see any real distinction between error apparent, if not merely clerical or arithmetical, and error proved ab extra. The

But the doctrine as laid down by Mr. Smith does apply here, and we must express an opinion on it; and we think it cannot be supported, and that the defendant can no more set up, as an excuse relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact. It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a prima facie duty to obey the judgment, he must be equally relieved whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can without arrogance say that, where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland, it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chance as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland and not in England.'

[1] As in Godard *v.* Gray, in regard to mistake.

[2] As in Meyer *v.* Ralli, 1 C. P. D. 358, also as to mistake.

[3] Smith's L. C. 448, 2d Eng. ed., quoted by Blackburn, J. supra; Simpson *v.* Fogo, 1 Hem. & M. 195; Liverpool Credit Co. *v.* Hunter, L. R. 3 Ch. 479, 484. See Castrique *v.* Imrie, L. R. 4 H. L. 414, 445.

[4] On the contrary, see Reimers *v.* Druce, 23 Beav. 145; Messina *v.* Petrococchino, L. R. 4 P. C. 144; Meyer *v.* Ralli, 1 C. P. D. 358, 370. See also Simpson *v.* Fogo, supra, Wood, V. C.; Becquet *v.* MacCarthy, 2 Barn. & Ad. 951, 957.

difficulty in the case under consideration arises, of course, from the fact that the foreign court ought to have applied the governing law; but the test of conclusiveness should arise upon the question whether it attempted to do so or contemptuously refused,[1] not whether there was a mistake apparent on the record in contrast with mistake to be shown by evidence aliunde.

The early English dicta above referred to were for a long time quite generally if not universally accepted by the courts of this country; the judgments of foreign countries, and judgments rendered in the sister colonies and states before the adoption of the Constitution and for a short time afterwards in many instances, were treated as only prima facie evidence of debt, liable to be disproved, like other evidence of that kind.[2] It will be seen that several of the cases cited as holding foreign judgments inconclusive are recent decisions. Only two of them, however, are direct adjudications to that effect, namely, Burnham *v.* Webster and Rankin *v.* Godard. The other recent cases (Middlesex Bank *v.* Butman and Taylor *v.* Barron) support the position only by dicta; and all of the cases cited are founded on the early English dicta now overruled. In two of the cases just cited (Barney *v.* Patterson and Taylor *v.* Phelps) it is said that when foreign judgments are only incidentally involved, they have the same conclusiveness as domestic judgments; and in Cummings *v.* Banks[3] it is said that all the American authorities agree in this proposition.

The books contain few American cases in which the question of the conclusiveness of foreign judgments has been directly involved and decided. In the last case cited, and in Monroe *v.* Douglas,[4] it was clearly intimated that they could not be im-

[1] See Castrique *v.* Imrie, L. R. 4 H. L. 414, 445.

[2] Hitchcock *v.* Aicken, 1 Caines, 460; Taylor *v.* Bryden, 8 Johns. 173; Pawling *v.* Bird, 13 Johns. 192; Bartlett *v.* Knight, 1 Mass. 400; Buttrick *v.* Allen, 8 Mass. 273; Bissell *v.* Briggs, 9 Mass. 462; Winchester *v.* Evans, Cooke, 420; Glasgow *v.* Lowther, ib. 464; Taylor *v.* Phelps, 1 Har. & G. 492; Barney *v.* Patterson, 6 Har. & J. 182; Benton *v.* Burgot, 10 Serg. & R. 240; Williams *v.* Preston, 3 J. J. Marsh. 600; Aldrich *v.* Kinney, 4 Conn. 380; Garland *v.* Tucker, 1 Bibb, 361; Pritchet *v.* Clark, 3 Har. (Del.) 717; Clark *v.* Parsons, Rice, 16; Bimeler *v.* Dawson, 4 Scam. 536; Burnham *v.* Webster, 1 Woodb. & M. 172; Middlesex Bank *v.* Butman, 29 Maine, 19; Taylor *v.* Barron, 30 N. H. 78; Rankin *v.* Godard, 54 Maine, 28.

[3] 2 Barb. 602.

[4] 4 Sand. Ch. 126.

peached on the merits. The point arose, however, in the recent case of Lazier *v.* Westcott[1] in the Court of Appeals of New York. In a well-considered opinion Mr. Justice Davies, in pronouncing the judgment, adopted the late English view, holding a judgment between the same parties, in favor of the same plaintiff, to be conclusive.[2] The learned judge puts the opinion of the court upon the practical difficulties in the way of permitting the parties to open the judgment; and language is used much to the same effect as that of the Court of Queen's Bench in a case already cited.[3] We have elsewhere borrowed the suggestion of Mr. Baron Parke in Williams *v.* Jones[4] to the effect

[1] 26 N. Y. 146.

[2] In the concluding portion of his opinion he said: 'We think the rule adopted in England . . . should be adopted and adhered to here in respect to such foreign judgments, and that the same principles and decisions which we have made as to judgments from the courts of other states of the Union should be applied to foreign judgments.' The court relies much on the reasoning of Mr. Justice Story (Confl. Laws, § 607). 'It is indeed very difficult to perceive,' that authority says, 'what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause as formerly before the court upon the whole evidence may have been decidedly in favor of the judgment; upon a partial possession of the original evidence they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the whole evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed ex æquo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be prima facie evidence for the plaintiff would be a mere delusion if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial.'

[3] Bank of Australasia *v.* Nias, 16 Q. B. 717. See Ferguson *v.* Mahon, 11 Ad. & E. 179.

[4] 13 Mees. & W. 628, 633, quoted with approval in Godard *v.* Gray, L. R. 6 Q. B. 139, 148; ante, p. 238. As to the circumstances under which a duty to obey the foreign judgment arises, see Rousillon *v.* Rousillon, 14 Ch. D. 351, 370. See also Copin *v.* Adamson, L. R. 9 Ex. 345.

that a foreign judgment for a plaintiff raises a binding obligation to pay the same; and we have added that whatever the nature of the judgment, if the court had properly acquired jurisdiction, judgment and findings should follow in their conclusive character the law of the forum in which the proceedings were had, not as mere matter of comity, but because the proper authorities have fixed their effect. The foreign law ought to apply to a judgment pronounced according to it as well at least as to a contract made under it.

§ 2. *Constitutional Provision: Judgments of Sister States.*

We proceed now to consider the second and more important branch of our subject, judgments in personam of the sister states of the American Union.

Prior to the adoption of the Articles of Confederation the American colonies or (as they became by the Declaration of Independence) states were considered as foreign to each other by their courts in respect of the conclusiveness of their judgments; and the English doctrine as it was then understood prevailed, to wit, that such judgments were only prima facie evidence of debt. But the inconvenience of the rule was felt even at this early day, when intercourse and traffic between the colonies were comparatively limited. Accordingly, in at least one of the colonies, that of Massachusetts Bay, an act was passed [1] as early as in the year 1773, which provided that the judgments of courts of the neighboring colonies should be conclusive when sought to be enforced in Massachusetts, provided the courts which rendered them had jurisdiction.[2]

The fact that the act extended only to the judgments of the neighboring colonies indicates that it was passed more from considerations of utility than from motives of comity; for if the latter idea had prompted the legislation, it would have included at least all of the English-speaking provinces. But the fact was there was but little intercourse between the distant colonies and those of New England, and there was no occasion to make the act general. Subsequent events, however, increased the inter-

[1] Provincial Act of 14 Geo. 3, c. 2. [2] Bissell v. Briggs, 9 Mass. 462.

course; and it became necessary to make some general law suited to the new state of things.

To this end a provision was made in the Confederation in these words: 'Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.' Though the object of this clause seems now obvious, its language was not thought sufficiently full and clear; and it was therefore slightly changed in the final draft of the Constitution, and made to read as follows: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' [1]

In pursuance of the power thus granted, Congress passed the act of May 26, 1790, which after providing the manner of authentication declared that 'the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.'

The first section of the supplementary act of March 27, 1804, contained a further provision relating to the attestation of records from the sister states, followed by a clause identical with the one just quoted; and the second section of the act extended these provisions over the 'territories of the United States and the countries subject to the jurisdiction of the United States.'

As has been already observed, there was at an early day in the history of the United States some confusion concerning the construction of this provision of the Confederation and Constitution, and of the acts passed in pursuance. Before the decision in the celebrated case of Mills *v.* Duryee [2] had been made and become known the general current of construction was that the act of Congress had not changed the rule so generally received before that time, to wit, that the judgments of the sister colonies and states were only prima facie evidence,[3] though this

[1] Const. U. S. art. 4, § 1.

[2] 7 Cranch, 481.

[3] Hitchcock *v.* Aicken, 1 Caines, 460; Pawling *v.* Bird, 13 Johns. 192;

was by no means universal.[1] But the case referred to, and the contemporaneous case of Bissell *v.* Briggs, cited in the note, changed the current even in the states which had adopted the doctrine just mentioned. As the matter was one depending upon a proper construction of the Federal Constitution and of an act of Congress, deference was justly and readily yielded by the state courts to the judgment of the Supreme Court of the United States.[2]

Mills *v.* Duryee was an action of debt upon a judgment of the Supreme Court of New York, in the Circuit Court for the District of Columbia. The defendant pleaded nil debet, which upon general demurrer was held bad. On appeal to the Supreme Court of the United States counsel for the plea contended that the true construction of the constitutional provision and acts of Congress confined their operation to evidence only, and did not alter the rules of pleading. The 'effect' to be given to the copies of records was their effect as evidence; for it was not contended that an execution could issue there upon such a record. Counsel further argued that nul tiel record could not be pleaded because there was no way of procuring and inspecting the original record. This could not be pleaded upon a copy because that would give it greater credit than it would receive in New York. Counsel on the other side admitted that the record was to have effect only as evidence; but it was evidence of the highest nature, namely, *record* evidence, to which nil debet was a bad plea. In answer to the argument that a copy was not of the same dignity with the original, the act of Congress was referred to as making the authenticated exemplification equivalent to the original record in its proper state, and as communicating to it the same effect as evidence, making it capable of sustaining the same averments in pleading and of

Winchester *v.* Evans, Cooke, 420; and other cases cited ante, p. 264.

[1] Noble *v.* Gold, 1 Mass. 410, note; Bissell *v.* Briggs, 9 Mass. 462; Armstrong *v.* Carson, 2 Dall 302; Curtis *v.* Gibbs, 1 Penn. (N. J.) 399; Green *v.* Sarmiento, Peters C. C. 74; Blount *v.* Darrach, 4 Wash. C. C. 657; Turner *v.* Waddington, 3 Wash. C. C. 126.

[2] See cases cited below passim; and see Insurance Co. *v.* Harris, 97 U. S. 331. Judgments of the courts of record of the District of Columbia, at least judgments of the Supreme Court of the district, stand upon the footing of judgments of a state court. Embrey *v.* Palmer, 107 U. S. 3, 10.

abiding the same tests as the original record. It therefore could not be denied or controverted by any plea, such as nil debet, which put in issue the matters averred by the record; but the defendant should have either distinctly denied the record, or avoided it by pleading satisfaction. It was immaterial that the ministerial officers of the law in the district could not issue an execution upon the authenticated record, for that objection would be equally valid against the record when used in its proper state but out of the jurisdiction of its proper court, and also against the sentences of foreign courts of admiralty under the law of nations. The court adopted the view of the plaintiff's counsel that the effect of the Constitution and acts of Congress was to give the authenticated exemplification the conclusiveness of the highest or record evidence; to which the proper plea was nul tiel record.[1]

It will be observed that the court based the decision of the conclusiveness of the judgment rendered in New York upon the doctrine that under the Constitution and act of Congress it was record evidence; and that nil debet by the common-law

[1] 'Congress,' he said, 'have declared the *effect* of the record by declaring what faith and credit shall be given to it.' In regard to the defendant's second point he said that the record might 'be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection by the court of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that nil debet would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, however, is undoubted that an exemplification would in such case be decisive. The original need not be produced.' To the argument that execution could not issue directly on the judgment of a sister state he replied: 'This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.' In conclusion the learned judge says: 'Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision.'

system of pleading was an inadmissible plea in such a case. Mr. Justice Johnson seemed to understand the court as holding that nul tiel record was the only plea to be pleaded to an action of this kind; and as such a plea at common law would put in issue only the existence of the record, no inquiry could be made under any circumstances even into the jurisdiction of the court of the sister state. He was not in favor of so sweeping a rule. Though not opposed to holding the judgments in question conclusive of the merits, i. e. of the subject-matter and ground of the original action, he objected to a rule which (he supposed) would preclude all inquiry into the jurisdiction. The learned judge was not alone in thus construing the opinion of the majority of the court. Other courts at first supposed that the Supreme Court of the United States had pronounced the same rule.[1] If this was the intention, the rule has been modified, as we shall see, by later decisions of the same court, which hold that there is no estoppel in ordinary cases to deny the jurisdiction of the court which rendered the judgment sued upon.[2] But it has been maintained with great force that the court in Mills *v.* Duryee only intended to declare that nul tiel record was the proper general issue, and did not mean to preclude parties from pleading special pleas to the jurisdiction.[3] Whatever the court really meant to declare upon that point, it was agreed that the merits of the judgment sued upon were not open to inquiry; and this is all that we care to notice at present.

The same question involved in Mills *v.* Duryee arose a few years later in Hampton *v.* McConnel[4] in an action in South Carolina upon a judgment of the Supreme Court of New York. The same plea of nil debet was entered and overruled in the court below, and the decision of that court sustained by the Supreme Court of the United States; Chief Justice Marshall delivering the opinion, and declaring that only such pleas could

[1] Commonwealth *v.* Green, 17 Mass. 515, 546; Hall *v.* Williams, 6 Pick. 232, 243. See Carleton *v.* Bickford, 13 Gray, 591.

[2] D'Arcy *v.* Ketchum, 11 How. 165; Christmas *v.* Russell, 5 Wall. 290; Cheever *v.* Wilson, 9 Wall. 108; Thompson *v.* Whitman, 18 Wall. 457; post, p. 296.

[3] Shumway *v.* Stillman, 4 Cow. 292; s. c. 6 Wend. 447.

[4] 3 Wheat. 234.

be pleaded as would be good to an action upon the judgment in the domestic courts.[1]

The provision of the Constitution, as expounded in Mills *v.* Duryee, has undergone minute examination; this we shall now see. In a subsequent case before the same court the question arose whether, under the Constitution and act of Congress, the Statute of Limitations of Georgia could be pleaded to an action in that state founded on a judgment rendered in South Carolina. It was the opinion of the court that the provisions upon the subject were intended only to preclude inquiry into the subject-matter of the judgment; and that therefore the Statute of Limitations, not being a plea to the merits, was an admissible plea.[2]

[1] See Griffin *v.* Eaton, 27 Ill. 379, holding that if technicalities have been abolished in the sister state, they must not be used to defeat the judgment elsewhere. But judgment rendered in a sister state can of course have no greater effect than it would have where rendered.

[2] McElmoyle *v.* Cohen, 13 Peters, 312. See Jones *v.* Drewry, 72 Ala. 311 (non-claim); Matoon *v.* Clapp, 8 Ohio, 248. The learned judge who delivered the opinion in McElmoyle *v.* Cohen, Mr. Justice Wayne, said: 'Though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely prima facie evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, and by the act of May 26, 1790, § 1 (1 Stat. at Large, 122), the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed. It must be obvious, when the Constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits when it is sought to carry them into judgments by suits in the tribunals of another state. The authenticity of a judgment, and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a state is given by the Constitution independently of all legislation. By the law of 26th of May, 1790, the judgment is made a debt of record not examinable upon its merits; but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state court cannot be enforced out of the state by an execution issued within it. This concession admits the conclusion that . . . judgments out of the state in which they are rendered are only evidence in a sister state that the subject-matter of the suit has become a debt of record which cannot be avoided but by the plea of nul tiel record. But we need

But 'full faith and credit' must be given to the judgment; and if binding where it was rendered, it cannot be made of no effect in another state by any Statute of Limitation there enacted touching the *original* cause of action, even towards the citizens only of that state.[1]

On the other hand, it has been considered that if a judgment were barred by limitation in the state in which it was rendered, it cannot be sued upon in another state.[2] In a late case in Maine it appeared that the indorsee of a note had sued the maker in Massachusetts. The defendant pleaded payment and the Statute of Limitations, and obtained a general verdict in his favor. After this judgment the payee in some way obtained

not doubt what the framers of the Constitution intended to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect rei judicatæ throughout Europe, in England, and in these states, when our first Confederation was formed. On the Continent it was then and continues to be a vexed question, determined by each nation according to its estimate of the weight of authority to which different civilians and writers upon the law of nations are entitled. . . . In these states when colonies the same uncertainty existed. When our Revolution began and independence was declared, and the Confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state in all the states, would produce such intimate relations between the states and persons that the former would no longer be foreign to each other in the sense that they had been as dependent provinces; and that for the prosecution of rights in courts it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. . . . What faith and credit then is given in the states to the judgments of their courts? They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and consequently are conclusive upon the defendant in every state except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. In other words, as has been said by a commentator upon the Constitution: "If a judgment is conclusive in a state where it is pronounced, it is equally conclusive everywhere in the states of the Union." Story, Const. § 183. It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit.' See also Green *v.* Sarmiento, Peters C. C. 74; and see especially the ground taken in Jones *v.* Drewry, 72 Ala. 311, where a local statute of non-claim was successfully pleaded to an administration decree obtained in Virginia.

[1] Christmas *v.* Russell, 5 Wall. 290, holding a statute of Mississippi of the kind unconstitutional. See post, p. 282.

[2] David *v.* Porter, 51 Iowa, 254. The judgment in question in this case (rendered in Nebraska) was, however, deemed to be merely 'dormant' in Nebraska, and an action upon it was allowed.

possession of the note and brought suit against the maker in Maine. The latter pleaded the judgment rendered in Massachusetts; whereupon the plaintiff offered evidence to show that that judgment had been rendered upon a plea of the Statute of Limitations. The court held the evidence inadmissible, saying that it was immaterial whether the verdict was given upon that ground or upon the plea of payment. The judgment was conclusive in Massachusetts, and must therefore be conclusive in Maine. The note had also ceased to be negotiable by the judgment, having passed into the custody of the court.[1]

The Constitution does not require courts to give effect to disqualifications entailed in a sister state upon conviction of crime.[2] A contrary view has been maintained in North Carolina, where it is held that a witness incompetent by conviction for a crime in a sister state is incompetent to testify in the courts of North Carolina.[3] Nor under the Constitution does a judgment rendered in a sister state rank as a domestic judgment in marshalling assets. It has no effect in this direction.[4] It has also been held in a late case that the courts of one state may restrain a party from proceeding to enforce a judgment obtained in another state, where the defendant had been fraudulently led to believe that the suit in the sister state had been abandoned;[5] but the doctrine is not settled.[6]

Nor does the Constitution require any state to enforce the police regulations of another, or qui tam actions and the like. But when the courts of another state have taken cognizance of a matter of local police regulation, the judgment is entitled to full faith and credit throughout the Union, and will entitle the plaintiff to maintain an action thereon though such regulations could not be enforced out of the state by an original action. And the courts of the state in which the judgment is sued upon will hold the same conclusive of the merits.[7] Again,

[1] Sweet *v.* Brackley, 53 Maine, 346.

[2] Commonwealth *v.* Green, 17 Mass. 514.

[3] State *v.* Candler, 3 Hawks, 393.

[4] McElmoyle *v.* Cohen, 13 Peters, 312; Cameron *v.* Wurtz, 4 McCord, 278; Brengle *v.* McClellan, 7 Gill & J. 434; Harness *v.* Green, 20 Mo. 316.

[5] Engel *v.* Scheuerman, 40 Ga. 206. So Pearce *v.* Olney, 20 Conn. 544.

[6] Post, pp. 302–305.

[7] Indiana *v.* Helmer, 21 Iowa, 370; Healy *v.* Root, 11 Pick. 389. In the case first cited for this proposition the action was based upon a judgment rendered in another state in accordance

it is held that the Constitution has no reference to matters subsequent to the judgment, such as issuing and returning execution thereon, and that the same faith is not due to these as to the judgments of sister states.[1]

§ 3. *Application of Rule of Res Judicata.*

We turn now to the consideration of these judgments of sister states in their more specific relation to the rule of res judicata. In the first place it may be insisted that the judgment shall have no more than its proper effect of res judicata.[2] The case first cited was an action upon a joint judgment of a sister state, from the record of which it appeared that a defendant therein, not sued in the present action, had not been served with process in the first suit. In most of the cases which have occurred upon this subject the defendant who was not served has raised the objection, but in this case the defendant who was properly before the court was alone sued in the second instance, and raised the objection, and the court sustained it. Mr. Jus-

with a statute of that state prescribing proceedings to enforce the support of bastard children by the father. To the objection that this was a proceeding to enforce a mere police regulation of another state, the court replied: 'There is much truth in the legal proposition upon which this claim rests; but the error is in its application. If the mother of a bastard child, begotten and born in the state of Indiana, had come to Iowa and sought legal proceedings to compel the defendant, its father, to support it and to give bond therefor and otherwise comply with the requirements of the statutes of Indiana, the answer of the defendant, that the subject-matter of such action was one of merely local police regulation of Indiana not enforceable in this state, would have been conclusive, and amounted to a complete defence. Graham *v.* Monsergh, 22 Vt. 543. Such an action can no more be sustained beyond the limits of the sovereignty within which it arose than can an action for any other penalty provided by statute of such sovereignty for the wrongful act of a defendant therein. Both are alike matters of local internal police, and enforceable alone by the sovereignty making the regulation and providing the penalty. But where the local jurisdiction has attached, and the courts of that state or sovereignty have properly taken cognizance of the matter, and rendered judgment for such penalty, such judgment is entitled to "full faith and credit" in every other state. . . . And the courts of such other state will not inquire into the facts upon which it was based, nor whether the cause of action would have been enforced by them.'

[1] Carter *v.* Bennett, 6 Fla. 214.

[2] Smith *v.* Smith, 17 Ill. 482; Candee *v.* Clark, 2 Mich. 255; Knapp *v.* Abell, 10 Allen, 485; Hall *v.* Williams, 6 Pick. 232; Rangely *v.* Webster, 11 N. H. 299; Jones *v.* Gerock, 6 Jones Eq. 190.

tice Caton said: 'While he may not deny that it is a judgment against him, he may deny that it is a judgment against him and Hall.'[1]

In the case of Jones *v.* Gerock, above cited, the complainant filed a bill in chancery in North Carolina for dower and a distributive share. The defendants objected that she had filed a bill for the same purpose in Alabama, and had obtained a decree granting to her both objects; that her claim for a distributive share had been fully satisfied; and that in the case of the dower she had had lands of her husband laid off to her, in conformity to the decree. They therefore contended that she was estopped to maintain her present suit. But the objections were overruled. The court said that it did not understand the decree rendered in Alabama as embracing any property not in that state. As for the personal property, it would be necessary that it should be administered under the orders and authority of the courts of North Carolina, and that the courts of Alabama could exercise no control over it. And in respect of the decree for dower the court considered it as having reference to lands in Alabama only, so that those set off could not amount to a full satisfaction of the widow's claim.

On the other hand, in attributing to judgments rendered in a sister state the full force of res judicata the courts are bound, by the very language of the act of Congress, — though it has required the highest court to enforce the fact, — to treat such judgments, supposing no question of jurisdiction to arise, as they would be treated, in point of conclusiveness, in the state in which they were rendered.[2] Thus, judgment rendered in

[1] See also Suydam *v.* Barber, 18 N. Y. 468; Reed *v.* Girty, 6 Bosw. 567. In Brown *v.* Birdsall, 29 Barb. 549, Mr. Justice Roosevelt says: 'Where joint debtors reside in different states, they may be sued separately in the respective states having jurisdiction of their respective persons or property, and a judgment in such case against one in one state is no bar to a recovery against the others in another state.'

[2] Renaud *v.* Abbot, 116 U. S. 277, reversing Wilbur *v.* Abbot, 60 N. H. 40; Hanley *v.* Donoghue, 116 U. S. 1, 3, citing Maxwell *v.* Stewart, 22 Wall. 77; Insurance Co. *v.* Harris, 97 U. S. 331; Green *v.* Van Buskirk, 7 Wall. 139; Cooper *v.* Reynolds, 10 Wall. 308. See also Richards *v.* Barlow, 140 Mass. 218, to the same effect. These decisions explode the specious notion that a foreign judgment can be no better than a domestic judgment in the same case.

Louisiana, valid by the laws of that state, against one of several joint debtors, the others not being served or within the jurisdiction of the court, is valid in New Hampshire, when suit is brought upon it, though such a judgment would be void by the laws of the latter state.[1] In like manner, the record of a judgment in a sister state in favor of the plaintiff establishes conclusively, not only the right of action, but also the right of the plaintiff to sue in the capacity in which he brought the original suit. For only such pleas as would be good to an action upon the judgment in the sister state may be pleaded elsewhere. A plea to the capacity of the plaintiff to sue, for example, as a lunatic, by next friend, would be a plea in abatement, proper only in the original action; and if not then pleaded, it could not be pleaded to a suit upon the judgment in that state or consequently in any other.[2]

Again, it has been held that the omission by the plaintiff in a suit in another state upon a penal bond to assign breaches and have the damages assessed by a jury, in a judgment by default, cannot be alleged as a defence to a suit upon the judgment rendered in the case.[3] So too it is said that where it appears that the plaintiff might have insisted upon his right to recover upon all grounds relied upon in a new suit by him in another state, the former judgment against him will be conclusive.[4] He cannot withhold his evidence and then sue again upon the same demand.[5]

A judgment rendered in a sister state, however, can no more than a domestic judgment[6] bar an independent demand, though springing from the same ground as the former suit.[7] Thus, the fact that a decree of divorce merely has been pronounced will

[1] Renaud *v.* Abbot, 116 U. S. 277; Hanley *v.* Donoghue, ib. 1. Such laws are valid. Ibid.

[2] Cook *v.* Thornhill, 13 Tex. 293; Wayland *v.* Porterfield, 1 Met. (Ky.) 638. So, a judgment for a party, rendered in another state, is conclusive evidence of the existence of that party at the time of the rendition of the judgment. Cook *v.* Steuben Bank, 1 G. Greene (Iowa), 447.

[3] Goodrich *v.* Jenkins, Wright, 348; s. c. 6 Ohio, 44. Comp. ante, p. 78.

[4] Baker *v.* Rand, 13 Barb. 152.

[5] Ibid.

[6] Ante, pp. 174 et seq.

[7] See ante, pp. 174–186, in regard to this rule as applied to domestic judgments. The application of the rule to cross-demands is there considered.

not estop the wife from suing for alimony in another state if that matter has not been litigated in the first suit, though this second suit by the wife be one for divorce as well as alimony, based upon an allegation that the former decree, obtained by the husband, was illegal. And this too though the bill is dismissed so far as it prays for divorce. But a decree for alimony in this second suit will preclude the husband from contesting the claim in a third suit, brought by the wife in another state, based upon the decree for alimony.[1] In the case cited for this proposition a husband had sued in Kentucky for divorce. The wife appeared and defended, but the court decreed in favor of the husband. Afterwards the wife sued the husband in the courts of Ohio, where the parties then resided, for a divorce *and alimony;* alleging that the decree in Kentucky was void by reason of want of jurisdiction in that the husband was not a resident of Kentucky at the time of the decree; also that the decree had been obtained by fraud. These allegations were traversed, and the Kentucky decree set up as an estoppel. The court in Ohio, however, decided that the decree had been legally rendered, and by a court of competent jurisdiction; but that, inasmuch as the Kentucky court had made no provision out of the estate of the husband for the support and maintenance of the wife, and as the propriety of so doing had not been adjudicated upon in that case, the husband should pay the wife the sum of $3,000 alimony. The money not having been collected in Ohio, the wife sued upon the decree in Kentucky to subject certain property of the husband to the payment of the alimony. The defendant again relied upon the first decree, rendered at his own suit in Kentucky, and insisted that the Ohio court had no jurisdiction over the subject-matter, and that its decree was therefore void. In regard to this question it was held, in accordance with a familiar doctrine, that as the husband had appeared in the Ohio suit and contested the claim of the wife, the court had jurisdiction both of the person and subject-matter;[2] and the wife prevailed.

[1] Rogers *v.* Rogers, 15 B. Mon. 364. See McCall *v.* Carpenter, 18 How. 297.

[2] It was also contended that the Ohio decree had been pronounced in utter disregard of the previous decree in Kentucky between the parties. Upon

Two or three other special points touching the application of the rule of res judicata in relation to these judgments of courts

this point the court, speaking by Mr. Justice Simpson, said: 'If the decree which had been pronounced in the suit between these parties in the Kenton Circuit Court, in this state, was thus comprehensive, and had the legal effect attributed to it in this argument, then it would seem to follow that, so far as the court in Ohio undertook to modify or change it, its action was revisory; it was exercising an appellate jurisdiction which did not belong to it; and consequently its decree was void for want of jurisdiction. We suppose the position will not be controverted that so far as the courts of any of the states might attempt to change or alter the judgments or decrees of another state upon the ground that the decision of the case was erroneous, they would be assuming the exercise of a jurisdiction that does not belong to them, and their action in the premises would be wholly invalid. In illustration of this principle we will suppose that an issue had been made and fairly tried in a court of competent jurisdiction in this state, and a final judgment rendered between the parties on the matters involved in the issue, and that afterwards one of the parties had attempted to relitigate the same matters, between the same parties, in one of the courts of a sister state, having jurisdiction in similar cases, and the court there should permit it to be done, and should render a judgment in conflict with the one which had been previously rendered by the court in this state. Would such a judgment be valid in either state? Would not the court that rendered it have virtually assumed, in sustaining the right of one of the parties to retry the same matters which had been previously decided, a revisory jurisdiction over the judgment of a court of another state? The power to relitigate the same matters might not be expressly put upon this ground; but a court that undertakes to do it does in effect assume an authority which can only be legitimately exercised by a court having some jurisdiction over the judgment first rendered. As no such jurisdiction is vested in the courts of any of the states over the judgments rendered by the courts of other states, it follows that its assumption would be unauthorized, and the action of the court in its exercise utterly void and unlawful. But while the correctness of this doctrine is conceded, its applicability in the present case is the point to be determined. . . . Nothing was alleged [in the first suit] by either party in relation to the husband's estate, nor was there any claim for a portion thereof presented by the wife in the event that the husband should succeed in obtaining a divorce. Her right to it in that event was not, therefore, put in issue nor decided by the court unless the decree which was rendered granting a divorce to the husband had the legal effect attributed to it of absolving the husband and his estate from all liability to contribute anything towards the support of the wife.' After showing that the statute upon the subject did not have this effect he proceeds: 'Whether the wife, having failed to present her claim for a portion of the husband's estate to the court granting the divorce, would be thereby precluded from asserting it in a subsequent action against the husband, it is unnecessary to determine. It is sufficient for the purposes of the present inquiry that the matter was not res judicata, and consequently that the court in Ohio, in the decree which it rendered, did not undertake to retry an issue which had been previously decided by a court of competent jurisdiction in this state. If it were conceded that the wife, by her failure to present her claim to a portion of the estate of the husband in the suit in which the divorce was granted, ought to be thereby precluded from asserting it in another ac-

of the sister states may be noticed. It is not a good plea to an action against executors founded on a judgment rendered in a sister state that there never were any assets of the testator in that state; for as the judgment there would have been effectual to authorize execution against any assets which the defendants might at any time thereafter have possessed, so it would be sufficient to authorize judgment against them when sued upon elsewhere, and execution upon any assets to be found by virtue of the judgment in the second action.[1]

In a suit for an injunction by a principal against a surety to restrain the latter from selling certain property of the former which the surety claimed had been forfeited by the failure of the principal to carry out an agreement for the rent of a hotel, the principal offered evidence received on a former trial between the parties, to the effect that the hotel property had become untenantable, contrary to the agreement with the lessor, whereby he had been compelled to abandon the property before the lease expired, and without rendering himself liable to the lessor for the reason named. The surety, thinking him liable, had effected a settlement with the lessor by paying him several thousand dollars, on account of which he was proceeding to sell the property in question. To rebut the testimony offered by the complainant, that he had incurred no liability in abandoning the hotel, the defendant surety introduced the record of a judgment rendered in another state, in a suit between the present complainant and the lessor of the hotel property, wherein it was decided that the former was not justified in abandoning the property, and that he was liable on the lease for the rent of the unexpired term. The court held that this concluded the

tion, it would not follow that the decree rendered by the court in Ohio would for that reason be invalid, or be void for want of jurisdiction. The most that could be urged against it on that ground would be that it was erroneous; until reversed, however, or if it be irreversible, it is entitled to the same consideration and has the same legal force and effect of any other valid decree.' The latter point, we apprehend, was the main one relied upon for the decision; and whatever may be correct concerning the first position, that the court in Ohio had rightly entertained the prayer for alimony, it cannot be doubted that, having passed upon the question, it must have been considered as conclusive in all other courts of the Union, in accordance with the provisions of the Constitution and act of Congress.

[1] Davis *v.* Connelly, 4 B. Mon. 136.

principal upon his liability, that the settlement between the surety and lessor was therefore proper, and denied the injunction to restrain the surety from selling the property in question.[1]

A similar case is reported from the Supreme Court of New York.[2] In that case the owner of a vessel in New York became indebted to another, who seized his vessel in Ohio under a statute of that state. The present plaintiff became surety in a bond for the release of the vessel. The principal debtor defended the suit, but judgment was rendered against him, and the plaintiff, his bondsman, was compelled to pay the amount. In the present suit by the latter against his principal for reimbursement the record of the judgment in Ohio was held conclusive of the validity of the claim, and of the seizure and proceedings.

Nor can error of fact in the enrolment be set up collaterally against the judgment. In the case of Hassell *v.* Hamilton[3] the plaintiff suing to recover a slave, and deriving title through a decree of the Supreme Court of Tennessee, endeavored to show that that court had made a mistake in decreeing to him title to another slave of the same name as the one he was now suing for; and that the mistake and real intention of the court appeared clearly both from the whole record and the matter adduced in evidence at the present trial. But the court replied that the alleged mistake could not be noticed in the courts of another state; nor could such courts reform a decree of a sister state so as to make it speak the unexpressed intention of another court.

In a case in the Supreme Court of Iowa[4] the defendant to an action upon a judgment rendered in a sister state endeavored to show that the judgment was void because rendered upon a contract made while he was a minor, and not for necessaries, and that he did not appear by guardian, but by attorney. But the court said that the defendant's remedy was by a writ of error coram nobis, or some similar process, in the court of the sister state. If there was error in fact, it was an irregularity merely,

[1] Destrehan *v.* Scudder, 11 Mo. 484.
[2] Stedman *v.* Patchin, 34 Barb. 218.
[3] 33 Ala. 280.
[4] Milne *v.* Van Buskirk, 9 Iowa, 558.

and could no more affect the validity of the judgment than if it had been an error of law. In neither event would the error render the judgment void; it would render it only erroneous, and until set aside in the state where rendered it was not liable to impeachment elsewhere.[1]

In an action upon a judgment for costs, rendered in another state, the defendant attempted to impeach the judgment by showing that the counsel who brought the suit in his name, and conducted it to its termination, did not file his warrant of attorney. The Supreme Court of Pennsylvania ruled that though this might have been ground for an application to open the judgment in the state where it was declared, or for a writ of error, or for an action against the attorney, it was no ground whatever for impeaching the judgment in a collateral action.[2]

A decree in favor of the complainant, rendered in Virginia, was offered in evidence between the same parties in a suit in regard to the same matter in Louisiana, and its admission strenuously contested on grounds of irregularity and fraud. The court below rejected the decree, but that ruling was reversed on appeal, and judgment given in accordance with the Virginia decree. This judgment having been but partly satisfied in Louisiana, suit was again instituted in Virginia, when the defendants again attempted to impeach the first decree. But the court, relying upon the judgment pronounced in Louisiana, refused to consider the attack upon it.[3]

Judgment of a sister state court having recognized jurisdiction is valid and conclusive elsewhere, and cannot be brought in

[1] See ante, p. 116; also Weyr *v.* Zane, 3 Ohio, 306; Goodrich *v.* Jenkins, Wright, 348; Riley *v.* Murray, 8 Ind. 354; McLendon *v.* Dodge, 32 Ala. 491; Gunn *v.* Howell, 35 Ala. 144; Hassell *v.* Hamilton, 33 Ala. 280; Taylor *v.* Kilgore, ib. 214; Hart *v.* Cummins, 1 Clarke (Ia.), 564; Struble *v.* Malone, 3 Clarke (Ia.), 586; Milne *v.* Van Buskirk, 9 Iowa, 558; Indiana *v.* Helmer, 21 Iowa, 370; Barringer *v.* Boyd, 27 Miss. 473; Conway *v.* Ellison, 14 Ark. 360; Buford *v.* Kirkpatrick, 8 Eng. 33.

[2] Rogers *v.* Burns, 27 Penn. St. 525; Cyphert *v.* McClune, 22 Penn. St. 195; Coxe *v.* Nicholls, 2 Yeates, 546; Denton *v.* Noyes, 6 Johns. 296; Compher *v.* Anawalt, 2 Watts, 490.

[3] De Ende *v.* Wilkinson, 2 Pat. & H. 663; Rogers *v.* Rogers, 15 B. Mon. 364.

question even in a state in which it is declared by statute that a judgment of the kind shall not be binding upon the citizens of that state; such statute being deemed in contravention of the Constitution of the United States. Thus, in a case before the Supreme Court of the United States it appeared from the record that the plaintiff had recovered a valid judgment in Kentucky upon a promissory note, and had sued subsequently upon this judgment in Mississippi. The defendant relied upon an act of the legislature of the latter state, whereby it was declared that no action should be maintained on any judgment rendered without the state against a resident of the state, in any case where the cause of action would have been barred had the suit been brought in Mississippi. The case in question came within the language of this act; and the Supreme Court of the United States declared the same unconstitutional and void. 'Beyond all doubt,' the court observed, 'the judgment was valid in Kentucky, and conclusive between the parties in all her tribunals. Such was the decision of the highest court of the state, and it was undoubtedly correct; and if so, it was not competent for any state to authorize its courts to open the merits and review the case, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken.'[1]

A question of a similar kind came before the Superior Court of New York City[2] a few years ago. The case was an action upon a judgment rendered in Wisconsin. The defendant answered that the judgment was recovered upon a transaction which happened in the state of New York, upon which by the laws of that state no cause of action accrued; that the plaintiffs owed the defendant $350.70, for merchandise and liquors; and that the plaintiffs owed him $110 upon a judgment recovered in Wisconsin. From the testimony it appeared that the plaintiffs had bought the merchandise and liquors on four months' time, and that having paid all but about $100 of the amount due for the same, the present defendant sued the present plaintiffs for the balance due, and recovered the judgment above mentioned. It further appeared that the plaintiffs, about a month

[1] Christmas *v.* Russell, 5 Wall. 290. [2] Phillips *v.* Godfrey, 7 Bosw. 150.

prior to this suit, brought the action which terminated in the judgment now sued upon; in which action they alleged the sale by defendant to them of the liquors and merchandise upon 'a representation and warranty' on which the plaintiffs relied, and then averred that the quality of the goods had been misrepresented, that they were poor, worthless, and of no use to the plaintiffs, whereupon the judgment in question was rendered. The defendant then moved to dismiss the complaint on the ground that the supposed cause of action was not enforceable by the laws of New York; and that the plaintiffs were precluded from recovering by reason of the judgment obtained by the defendant for the balance of the account. The court upon the first point ruled that though jurisdiction could only be entertained of causes of action recognized by the laws of New York, still, among these was a judgment rendered in a sister state; and that the judgment pronounced in Wisconsin must be received as conclusive regardless of the nature of the original cause of action, which could not now be inquired into.[1]

The effect of a judgment of a sister state in insolvency, under a law of that state, arose in Vermont in the case of Hall *v.* Winchell.[2] The case was an action of debt upon a judgment of the Common Pleas of Massachusetts, rendered in the year 1858. The defendant pleaded inter alia his discharge in insolvency in Massachusetts; and that the debt sued upon was contracted prior to the institution of the proceedings in insolvency in the year 1863. The plaintiff admitted that the parties were both residents of Massachusetts at the time of the judgment; but he alleged that the cause of action arose, and the promises for the breach of which the plaintiff recovered the judgment sued upon were made and to be performed, in Vermont. He further alleged that prior to the proceedings in insolvency he

[1] In regard to the second objection, it was held that the judgment obtained by the defendant for the balance due for the goods concluded the plaintiffs on nothing except that they owed the price of the goods; and that this was perfectly consistent with the liability of the defendant for damages for misrepresenting their quality. The plaintiffs were not bound to recoup, but might avail themselves of the right of suing for this wrong.

[2] 38 Vt. 588.

had brought suit against the defendant and attached his property in Vermont. The defendant demurred; and the demurrer was sustained.[1]

It is hardly needful to say that it is equally true of a judgment rendered in a sister state, as of one rendered in a domestic court, that to give conclusive effect in respect of a cause of action there must have been a trial on the merits of the case; and if the judgment has gone off upon any preliminary matter, before a hearing upon the main issues of the case, as, for instance, for want of appearance or prosecution, the judgment is not an estoppel in regard to the cause of action,[2] because there has been no adjudication upon this point. The judgment might, perhaps, be conclusive upon the particular matter upon which the case went off,[3] but not of anything else. Where suit was brought upon a note, and the defendant pleaded in bar a judgment rendered in a foreign court the record of which showed that suit had there been brought between the same parties, upon the same and other notes, and judgment had been given in favor of the plaintiff on the other notes, but in regard to the one now

[1] The court by Wilson, J. said: 'It appears to be well settled in this state that a judgment rendered in one state, by a court having jurisdiction of the suit, will operate as a merger of the cause of action, and be a bar to the further prosecution of a suit in another state between the same parties and upon the same claim. But whether such is the effect of the plaintiff's judgment upon his original claim it is not necessary to decide; for whether it was the judgment, or the claim on which the judgment was founded, that was due to the plaintiff at the time of the institution of the proceedings in insolvency, is of no importance. Either of them was a debt due to the plaintiff, within the meaning of the statute. The plaintiff's counsel insists that the attachment in this state, prior to the commencement of the proceedings in insolvency which resulted in the defendant's discharge, should except his debt from the operation of the discharge; but we think the language of the statute does not justify such conclusion. The statute makes no such exception. It is a law of discharge; it does not merely take away the remedy in that state, but it fully and absolutely discharges the debt everywhere. Courts here should give the same operation and effect that was intended by the legislature of that state.'

[2] Sarchet *v.* Sloop Davis, Crabbe, 185, and cases cited; McElmoyle *v.* Cohen, 13 Peters, 312; Matoon *v.* Clapp, 8 Ohio, 248. So of a counter-claim presented against a suit in a sister state, but dismissed for want of prosecution. Rankin *v.* Barnes, 5 Bush, 20.

[3] But see Denny *v.* Bennett, 128 U. S. 489, Miller, J. quoting with approval the language of Bennett *v.* Denny, 33 Minn. 530, in regard to rulings upon motions and summary proceedings.

in question the defendant had gone without day or had been discharged, the court allowed evidence to be received to show that the plaintiff had withdrawn the note, and that it had not been passed upon, and that therefore there was no estoppel.[1]

The rule in such cases is thus stated by Mr. Justice Nelson :[2] The judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is as a plea a bar, and as evidence conclusive between the same parties upon the same matter directly in question in another court or suit; but is no evidence of a matter which comes collaterally in question merely, nor of matter incidentally cognizable or to be inferred by argument or construction from the judgment.[3] Secondly, if it does not appear from the record that the verdict and judgment in the former suit were directly upon the point or matter sought to be put again in litigation in the second action, the fact may be shown aliunde, provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that when proved the verdict or judgment must necessarily have involved their consideration and determination by the jury.[4]

The cases we have been considering also show that the judgment must have been final and conclusive in the state in which it was rendered in order to give it conclusive effect; otherwise the judgments of sister states would be accorded greater effect than where they were pronounced.[5] And this is of course the doctrine in England in regard to foreign judgments.[6]

The rule of conclusiveness also holds in collateral actions in the Court of Chancery; and this court will not, subject to the limits pertaining to domestic judgments,[7] permit one who has

[1] Burnham *v.* Webster, 1 Woodb. & M. 172; Baker *v.* Rand, 13 Barb. 152, 160, 161, and cases cited.

[2] Lawrence *v.* Hunt, 10 Wend. 80, 83.

[3] Duchess of Kingston's Case, ante, p. 92; Jackson *v.* Wood, 8 Wend. 9; s. c. 3 Wend. 27.

[4] See Bailey *v.* O'Connor, 19 N. H. 202. This subject has been considered at length in the chapter on Domestic Judgments in Personam.

[5] Comp. Nouvion *v.* Freeman, 37 Ch. D. 244, C.A.

[6] Nouvion *v.* Freeman, supra; Frayes *v.* Worms, 10 C. B. N. S. 149; Plummer *v.* Woodburne, 4 Barn. & C. 625; Douglas *v.* Forrest, 4 Bing. 686.

[7] Ante, pp. 201, 202.

had his claims investigated in another state to raise the same questions for reinvestigation on the same facts.[1] Therefore an answer to a bill filed in Vermont that a decree was pronounced in Massachusetts, dismissing a bill in chancery for the same cause, between the same parties, the court having jurisdiction, is a good estoppel.[2] Judgment by confession in the clerk's office during vacation is also conclusive;[3] and the same is true of judgment confessed by an attorney by virtue of a warrant empowering 'any attorney of any court of record in the United States to confess judgment.'[4] Nor is it necessary to the conclusiveness of the record that it state in detail all the proceedings in the case. It will be sufficient if it shows the subject-matter of the suit, jurisdiction over the parties, and the final judgment.[5]

The question was raised in Maryland in the year 1824 whether the federal courts were foreign to the state courts so as to make their judgments liable to impeachment upon the merits, as at that time was supposed to be the law of foreign judgments.[6] The case referred to was an action of ejectment, in which the appellee claimed title to certain real estate in Baltimore levied upon in attachment in the federal court of Maryland by the United States, and sold by the marshal to him. The suit in the federal court was upon a bill of exchange. Upon the present trial it was contended that there was no proof of the handwriting of the drawer of the bill referred to, in the suit in the United States court, or of that of the indorsers of the same; that there was no evidence that the bill had been presented for payment, and none that the debt was due. The judgment was a foreign one, and it made no difference whether it came before the court incidentally or directly; in either case it was subject to impeachment.

[1] Brown *v.* Lexington & D. R. Co., 2 Beasl. 191; Low *v.* Mussey, 41 Vt. 393; Munson *v.* Munson, 30 Conn. 425. See Pennington *v.* Gibson, 16 How. 65; Nations *v.* Johnson, 24 How. 195, 203.

[2] Low *v.* Mussey, supra.

[3] Harness *v.* Green, 19 Mo. 323.

[4] Randolph *v.* Keiler, 21 Mo. 557.

[5] Knapp *v.* Abell, 10 Allen, 485, per Gray, J. See Grignon *v.* Astor, 2 How. 340; Hockaday *v.* Skeggs, 18 La. An. 681.

[6] Barney *v.* Patterson, 6 Har. & J. 182.

The court said that though the rule was that foreign judgments were not conclusive of the merits where the parties claiming the benefit of them apply to our courts to enforce them, still, when such judgments came incidentally under consideration, they had the same force and effect as domestic judgments.[1] But the federal courts were not foreign to the state courts. The Constitution and laws of the United States were the supreme law of Maryland; the laws of Maryland furnish rules of decision for the United States court, and causes commenced in the state courts might be removed for trial to the Circuit Court. The citizens of Maryland were returned as jurors in that court, and were amenable to its process; and their property was liable to seizure and sale by the marshal of the district under executions from that court: these and other attributes of a domestic court placed it upon a ground very different from that of a foreign court. The point is well settled.[2]

As the result of the cases, the construction placed upon the Constitution and acts of Congress relating to the judgments of courts of record of the sister American states, of the District of Columbia,[3] and of the federal courts, may be thus stated: —

1. Such judgments are to be regarded as record evidence throughout the Union.

2. Such judgments, if final and conclusive where rendered, are to be regarded as conclusive throughout the Union upon all issues that were tried in the sister state even though the proceedings were irregular and erroneous, and it may be added though an appeal or proceeding to vacate the same be pending unless the effect of the appeal be to abrogate or suspend the judgment.[4] But it must be observed that the rule is otherwise in case it be made to appear (by the record or otherwise) that

[1] Taylor *v.* Phelps, 1 Har. & G. 492; ante, p. 258. But where the judgment through which title is claimed is void, as for want of jurisdiction, the fact may be shown and the chain of title thus destroyed. Rider *v.* Alexander, D. Chip. 267; McCall *v.* Carpenter, 18 How. 297.

[2] Chicago R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18; Embrey *v.* Palmer, 107 U. S. 3, 10; Thompson *v.* Lee Co., 22 Iowa, 206; Womack *v.* Dearman, 7 Port. (Ala.) 513.

[3] Embrey *v.* Palmer, 107 U. S. 3, 10.

[4] Merchants' Ins. Co. *v.* De Wolf, 33 Penn. St. 45. And the same is true of the judgments of foreign countries. Scott *v.* Pilkington, 2 Best & S. 11.

the judgment was void either by the general principles of justice as understood in civilized countries, or by the law of the state in which it was rendered.[1]

§ 4. *Jurisdiction.*

Let us now turn again to the judgments of foreign countries and of colonies, and consider the course of authority concerning inquiry into the jurisdiction of the court which pronounced the judgment in question. In a case of high authority decided near the beginning of the present century in the King's Bench [2] the plaintiff declared in assumpsit upon a foreign judgment rendered in the island of Tobago, and at the trial before Lord Ellenborough produced a copy of the proceedings and judgment, certified under the handwriting of the Chief Justice of the court pronouncing the judgment; which, after containing an entry of the original declaration, set out a summons to the defendant, therein described as formerly of Dunkirk and now of London, which summons was returned, 'served, etc., by nailing up a copy of the declaration at the court-house door.' Judgment was afterwards given by default. It was alleged, and there was parol proof, that this mode of summoning absentees was warranted by the laws of the island, and commonly practised there. But the judgment was held not binding.[3]

[1] Embrey *v.* Palmer, 107 U. S. 3; McElmoyle *v.* Cohen, 13 Peters, 312, 326.

[2] Buchanan *v.* Rucker, 9 East, 192; s. c. 1 Camp. 72.

[3] In delivering the opinion of the court Lord Ellenborough said: 'There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons *absent from the island* must necessarily be understood persons who have been present and within the jurisdiction so as to have been subject to the process of the court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door, how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however fairly construed, does not warrant such an inference; for "absent from the island" must be taken only to apply to persons who had been present there and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at

A similar case was decided at a later day in the House of Lords.[1] The defendant in the case referred to was a subject of Scotland, while the judgment against him was pronounced in France, and the action was there begun and ended without his presence; the only summons being by affixing notice in a public place, in accordance, indeed, with the law of France. In his opinion Lord Brougham said that the same principle must be applied as that declared in the preceding case. The language of the court in Douglas *v.* Forrest[2] was referred to in this connection; which was the case of a testator whose domicil had been in Scotland where and when the suit in question was brought; but it appeared that he was absent from the country at the time of the action and had no personal notice of the proceedings, which terminated in a judgment against him. It was proved that by the law of Scotland the court might pronounce judgment against a Scotchman for a debt there contracted, though he had no notice of the proceedings and was absent from the country at the time. After holding that such a judgment was not contrary to natural justice, and that therefore it could be enforced in England, the court proceeded to say: 'We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected.'[3]

By the laws of Scotland, as stated by the court in this case, such a judgment would not be conclusive upon the merits if the defendant should choose to impeach it within forty years, but after that time, if not overturned, it would work an estoppel between the parties; and of course its conclusiveness abroad would depend upon the state of facts, in accordance with a rule already stated.

These cases are sufficient to show that the parties to a foreign judgment are not estopped ordinarily to deny the jurisdiction of the foreign court. We say 'ordinarily,' for it is possible that

the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained.'

[1] Don *v.* Lippman, 5 Clark & F. 1.

[2] 4 Bing. 686.

[3] See Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, reaffirming the doctrine of the above-cited cases. See also Copin *v.* Adamson, L. R. 9 Ex. 345.

if upon appearance between *citizens* [1] an issue had been joined between the parties upon this point, and this issue had been decided in favor of the jurisdiction, the decision in this particular would bar a retrial of the question. And this too though it should be conceded that the defendant's appearance, being merely entered to test the question of jurisdiction, had not per se given the court complete jurisdiction to try the merits of the case.[2]

There are also many English cases which show that foreign judgments are not considered as record evidence in England, but only as evidence of simple contract debt.[3] It would seem to follow from this that the jurisdiction of the foreign or colonial court could be called in question, even though facts were stated in the transcript which would show jurisdiction, such as appearance or a return of personal service upon the defendant by the officer, on the summons or citation.

The American doctrine concerning inquiry into the jurisdiction of courts of the sister states has until recently been in considerable confusion, as we shall see. It has already been noticed that it was at one time supposed by some of the courts that the rule in the case of Mills *v.* Duryee [4] had gone to the extent of declaring that the judgments of each state were so conclusive in every other that even the jurisdiction of the court of a sister

[1] Perhaps residents not being citizens would be bound in the same way; being under the protection of the local law, they would be bound by it. See Rousillon *v.* Rousillon, 14 Ch. D. 351; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; post, p. 297.

[2] Such appearance would not, ipso facto, give the court jurisdiction over the defendant for all purposes. Walling *v.* Beers, 120 Mass. 548. See Wright *v.* Andrews, 130 Mass. 149; Bissell *v.* Briggs, 9 Mass. 462, 468, 469; Wright *v.* Boynton, 37 N. H. 9; Lincoln *v.* Tower, 2 McLean, 482; Cunningham *v.* Goelet, 4 Denio, 71; General Nav. Co. *v.* Guillon, 11 Mees. & W. 877, 894; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 162; Chichester *v.* Chichester, 10 P. D. 186. General appearance is a waiver of defective notice. Frew *v.* Taylor, 106 Ill. 159, 162; People *v.* Sherman, 83 Ill. 165; Hale *v.* People, 87 Ill. 72; Harbaugh *v.* Albertson, 102 Ind. 69, 75. See King *v.* Penn, 43 Ohio St. 57. In regard to adjudication respecting the jurisdiction, see Segee *v.* Thomas, 3 Blatchf. 11; Bonsall *v.* Isett, 14 Iowa, 309; Shawhan *v.* Loffer, 24 Iowa, 217; Hungerford *v.* Cushing, 8 Wis. 324.

[3] Hawksford *v.* Giffard, 12 App. Cas. 122, Lord Herschell; Hall *v.* Odber, 11 East, 124; Plummer *v.* Woodburne, 4 Barn. & C. 625; Smith *v.* Nicolls, 7 Scott, 147; s. c. 5 Bing. N. C. 208; Bank of Australasia *v.* Harding, 9 C. B. 661.

[4] 3 Cranch, 381.

state was not open to inquiry.[1] But however general the language of the court in that case may appear, it is certain that it is not an authority for such a doctrine. The fact has often been pointed out that the record of the judgment there sued on showed explicitly that the court of the sister state had acquired jurisdiction of the person of the defendant, and no question was raised upon this point. The court having had jurisdiction, the judgment pronounced was of course absolutely unimpeachable. The decision must be considered with reference to the facts in the case.

We purpose now to consider first those cases in which the record of the judgment rendered in the sister state is either silent upon matters relating to jurisdiction, or does not contain a direct statement of facts which constitute jurisdiction. In an early case in Massachusetts[2] an action was brought upon a judgment rendered in Georgia, the record of which showed a return of personal service by the officer upon one of the defendants, and 'not to be found in the county' concerning the other. The record stated an appearance of the party served, by *his* attorney; but in a subsequent part of the record it was recited that the defendants (naming them) appeared by *their* attorney; whereupon judgment was rendered against them jointly. The defendant not served pleaded that he was never a resident of Georgia, had not been served with process in the case, and had not appeared therein. The plaintiff replied the record as an estoppel; but the court overruled the replication on demurrer.[3]

[1] Commonwealth v. Green, 17 Mass. 544; Gleason v. Dodd, 4 Met. 333.

[2] Hall v. Williams, 6 Pick. 232.

[3] Parker, C. J. said: 'If it appeared by the record that the defendants had notice of the suit, or that they appeared in defence, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially; and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress; for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here by showing that he was not within the jurisdiction of the court which rendered it; for it is manifestly against first principles that a man should be condemned . . . without an opportunity to be heard in his defence.' In regard to the recital of the appearance of the defendants by their attorney it was said: 'As this is a mere recital founded upon the prior proceedings, this cannot

In a case in Alabama similar to Hall *v.* Williams, just referred to, in which two defendants were sued on a judgment against them rendered in a sister state, it appeared that only one of them was personally served and had pleaded, but the record recited that the parties came by their attorneys. The court held that it would be intended that he only came who had made up the issue for trial.[1] It is worthy of note in both the cases cited that the recital in the record was that the *parties* came by attorney, without naming the defendants. It is consistent with this recital that the plaintiff and *one* defendant came by attorney; and it was not, in strictness, disputing the record to show that one defendant did not appear. Indeed, in the case of a non-resident defendant at least it would be proper to show that the appearance by attorney was authorized for a limited purpose only and not for the whole purpose of the trial, so that the estoppel would not extend beyond the facts within such special purpose, even though the party may have appeared in person as a witness in the cause.[2]

In an action in Connecticut[3] upon a judgment rendered in Rhode Island the record showed an appearance of the defendant by attorney; whereupon he offered to show that he had not authorized any one to appear for him, to which evidence the plaintiff objected on the ground that the record was conclusive of the matter. The court, however, ruled that the evidence was proper, because its admission involved no contradiction of the record; quoting the language of Lord Mansfield in a case in which he permitted the defendant to show a similar fact. His lordship said: 'The record of the Common Pleas amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name.'[4]

This precise question has never arisen in the Supreme Court

be taken to be an assertion of record that Fiske appeared by attorney, for it appears by the same record that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing, therefore, in the record which is contradicted by the second and third pleas, and the replication by estoppel is therefore bad and the plea good, which settles the case in favor of the defendants.'

[1] Puckett *v.* Pope, 3 Ala. 552; Catlin *v.* Gilders, ib. 536.

[2] Wright *v.* Andrews, 130 Mass. 149.

[3] Aldrick *v.* Kinney, 4 Conn. 380.

[4] Robson *v.* Eaton, 1 T. R. 62.

of the United States, which has revisory jurisdiction over the state courts in matters involving the construction of the federal Constitution and acts of Congress; but the opinion of the court may perhaps be inferred from what was said in a well-known case.[1] And though the case referred to related to the question of jurisdiction in the federal courts in suits between citizens of different states, the point now referred to would seem to have depended upon the same principles as if it had been a case under the act of Congress. In this case the defendant, L. P. Perry, had not been personally served with notice, nor had he personally appeared in the suit in question; but the record showed an appearance by counsel, and a defence to the action. Concerning the right of Perry to prove that the attorney had no authority to appear for him, Mr. Justice McLean said that the evidence did not contradict the record but explained it; the appearance was the act of the counsel, and not the act of the court. The defendant was not bound by the proceedings.

The cases above mentioned have been almost uniformly followed in America; and there is no rule more fully settled than that where the record merely recites an appearance by attorney, there is no estoppel to show that such attorney had no authority to appear,[2] or had but a limited authority.[3] The doctrine cannot be considered as at variance with the act of Congress; for the jurisdiction in such cases, it seems, would not be conclusively presumed in the domestic courts.[4] But as we shall presently see, it has been considered by the courts that the provisions of the Constitution and act of Congress do not extend to matters of jurisdiction. And it seems to be more than doubtful now, in the silence of the record in regard to the facts constituting jurisdiction, whether in a case of non-residents there would be even a prima facie presumption of the court's jurisdiction, though

[1] Shelton *v.* Tiffin, 6 How. 163.

[2] Watson *v.* New England Bank, 4 Met. 343; Bodurtha *v.* Goodrich, 3 Gray, 508; Denison *v.* Hyde, 6 Conn. 508; Welch *v.* Sykes, 3 Gilm. 197; Shumway *v.* Stillman, 6 Wend. 447; Kerr *v.* Kerr, 41 N. Y. 272; Westcott *v.* Brown, 13 Ind. 83; Baltzell *v.* Nosler, 1 Clarke (Ia.), 588; Lawrence *v.* Jarvis, 32 Ill. 304; Harshey *v.* Blackmarr, 20 Iowa, 161. The last-named case contains a very exhaustive discussion of the doctrine by Dillon, J. But see Warren *v.* Lusk, 16 Mo. 102.

[3] Wright *v.* Andrews, 130 Mass. 149.

[4] Ante, pp. 208, 209.

the court were one of record proceeding according to the course of the common law.[1] Probably the courts would not require the plaintiff in the judgment to prove the jurisdiction (in the silence of the record) where there was nothing to show that the defendant was a non-resident. But in Downer *v.* Shaw, above cited, it was held that where the record showed that the defendant was a non-resident, and then recited that it appeared to the court that he had notice of the pendency of the suit, the recital was not even prima facie evidence that the defendant was served with notice in the state in which the original suit was brought. The court said that the record stated a conclusion only, and not the fact upon which it was based. In view of the non-residence of the defendant it could be held to mean no more than that such notice had been given, actual or constructive, as according to the law of the state would warrant a judgment in rem.

There are some apparent exceptions to this rule, as in the case of scire facias against bail. In suits upon judgments rendered upon scire facias without an allegation of personal notice of this proceeding, it has been held that the defendant cannot allege the want of notice as a defence. This, however, is no exception in fact, for in the case of special bail the ground taken was that he would be presumed to be acquainted with the original suit, as he had come into court and there undertaken his peculiar liability.[2] But there have been contrary decisions on this point.[3]

In the case of Adams *v.* Rowe, cited in the note, it appeared that the plaintiff in a suit upon a judgment of another state had obtained the same against one Benson, and against the present defendant as his trustee. Personal service had been returned in regard to both. Execution was issued and returned unsatisfied. About a year afterwards a scire facias was sued out against the present defendant, who had in the mean time removed from the state; and the officer returned that he had summoned the defendant by leaving an attested copy of the writ at the last

[1] Downer *v.* Shaw, 22 N. H. 277; ib. 417; Adams *v.* Rowe, 2 Fairf. 89; Barringer *v.* King, 5 Gray, 9, 11; Commonwealth *v.* Blood, 97 Mass. 538.

[2] Delano *v.* Jopling, 1 Litt. 117; Poorman *v.* Crane, Wright, 347.

[3] Robinson *v.* Ward, 8 Johns. 86; Holt *v.* Alloway, 2 Blackf. 108.

and usual place of abode of the defendant. Judgment was finally rendered against him by default; and this was the judgment sued upon. The court held that the scire facias was not the commencement of a new suit, but only a continuance of the original action; that the court of the sister state, having acquired jurisdiction over the defendant at first, retained the same throughout, notwithstanding the fact that there was no personal service of the scire facias, or appearance; and the judgment was conclusive.

Where, however, pending suit a party dies and an administrator is appointed, this fact alone does not constitute the latter a party to the suit so as to dispense with personal notice. He must appear and make himself a party to the record; otherwise the court, though having had personal jurisdiction over his intestate, will not acquire it over him. And he may show the facts in a suit in another state upon the judgment, though the record contain a recital that he came in.[1]

[1] Gleason *v.* Dodd, 4 Met. 333. In the case just cited, a suit upon a judgment for costs rendered against a plaintiff in another state, the record recited that the plaintiff's administrator, defendant in the suit for costs, 'came in,' upon a suggestion of the death of his intestate. In the present suit upon the judgment he denied any appearance either personally or by attorney; and the question was whether he were concluded by the allegation in the record. Mr. Chief Justice Shaw said: 'By the laws of Maine, as well as those of Massachusetts, when a plaintiff dies his administrator, being appointed under the laws of the same state, without commencing a new suit may come in and prosecute the existing suit in the same manner as if he had commenced a new one. We understand the record to state that in pursuance of these provisions of law Dodd, claiming to be administrator with a right and power as administrator to prosecute that suit, appeared and made himself a party to it in order to prosecute the same to judgment. If this were so in fact, the court clearly had jurisdiction of the same and of the person of the administrator as such plaintiff, with power to render judgment against him on failure to prosecute according to his undertaking. Nor could he defend himself by showing that he has never been appointed administrator in Maine. . . . Is the record conclusive of that fact [of appearance]? The answer to this question we think depends on this, whether such appearance or coming in by himself personally, or by his authorized attorney, is necessary to give the court jurisdiction; and we think that it is. The administrator is a distinct party from the original plaintiff. He is not de facto a party on the fact of the death of the testator or intestate being suggested, and cannot be made such unless by his own voluntary act, or when he is compellable to appear on summons, and has in fact been summoned. By the death of the original plaintiff the suit is suspended and must remain so unless an administrator, qualified to act in the state where the suit is pending, shall thus come in. Until this

Parties and privies, then, will not be precluded from inquiring into the jurisdiction, —

1. When the record is silent upon the subject;

2. When it recites simply an appearance of the defendant by attorney;

3. When it is ambiguous or obscure.

Since the first edition of this work it has further been adjudged by the Supreme Court of the United States that the same rule prevails even though the record of the judgment sets out facts sufficient if true to show that the court which pronounced it had jurisdiction. The recital, however specific, affords at most but prima facie evidence of jurisdiction; and the defendant is now permitted to overturn it.[1] This is, of course, final authority.

It is a universal rule of law that a judgment of one state or country can have no effect upon the citizens of another, beyond property of theirs seized and disposed of, unless they were personally notified by service of process within the state of the

is done the court has no jurisdiction of the person of such administrator. We think, then, it is clear that as to this fact, thus necessary to give the court jurisdiction, the judgment is not conclusive.' In commenting upon the concluding remark of the court in a case already referred to (Hall *v.* Williams, 6 Pick. 232), that 'the full faith and credit required to be given in each state to the judicial proceedings of other states will prevent the admission of any evidence to contradict the facts which show a jurisdiction, if such appear on the record,' the learned judge said: 'This last remark we consider, taken in connection with the subject-matter, as applying to all such facts as tend to show jurisdiction of the court over the person; such as that he was arrested and gave bail, or was personally summoned; indicating his actual presence in the state at the time of the commencement of the action, and of course subject to its jurisdiction, or other facts of the like nature. . . . It therefore follows that the conclusiveness of judgments as to matters tending to show that the court had jurisdiction does not extend to such recitals, but only to specific averments of fact, such as an arrest, personal service, or personal appearance.'

[1] Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaslight Co., 19 Wall. 58; Pennoyer *v.* Neff, 95 U. S. 714; Hanley *v.* Donoghue, 116 U. S. 1, 3; Kingsbury *v.* Yniestra, 59 Ala. 320; Napton *v.* Leaton, 71 Mo. 358; Wright *v.* Andrews, 130 Mass. 149. See Kerr *v.* Kerr, 41 N. Y. 272; Starbuck *v.* Murray, 5 Wend. 148; Carleton *v.* Bickford, 13 Gray, 591; Bodurtha *v.* Goodrich, 3 Gray, 508; Rape *v.* Heaton, 9 Wis. 328. This overrules Wilcox *v.* Kassick, 2 Mich. 165; Lincoln *v.* Tower, 2 McLean, 473; Wilson *v.* Jackson, 10 Mo. 330; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600; Westcott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304; Lapham *v.* Briggs, 27 Vt. 26; Hall *v.* Williams, 6 Pick. 232; and dicta in Shelton *v.* Tiffin, 6 How. 163.

forum, or afterwards appeared generally in defence of the action; and this, too, regardless of any statute making publication or other notice not personal a substitute for the service of process.[1] And under the decisions of the Supreme Court of the United States above referred to the fact of non-residence, together with non-citizenship[2] and want of personal notice by service within the state in which the judgment was rendered, may now be shown, whatever may be the averments of the record. So too where part of the defendants are residents and part non-residents not notified, the latter (at least if not citizens) are not bound.[3] Indeed, it is laid down that judgment rendered against several non-residents jointly is in other states invalid against all if jurisdiction over any one of them by service or appearance was not obtained, though it was so obtained over others; unless there be evidence to show that by the law of the state of the forum a joint judgment may operate severally against the defendants.[4] The statutes of a state, however, are binding upon its own citizens; and whatever provision is made for bringing suits against *them* will be held obligatory in other states.[5] And it is well held that judgments bind residents in the same manner as citizens.[6] But a law which should make citizens or residents

[1] Galpin *v.* Page, 18 Wall. 350; Durant *v.* Abendroth, 97 N. Y. 132; ante, p. 204. Nor can a judgment against a non-resident not served and not appearing be sued upon in the state in which it was rendered, or be made available against other property than that attached. Ibid.; Boswell *v.* Otis, 9 How. 348; Cooper *v.* Reynolds, 10 Wall. 308; Durant *v.* Abendroth, 97 N. Y. 132, 141; Schwinger *v.* Hickok, 53 N. Y. 280.

[2] A citizen of a state may be a non-resident there; but as a citizen he would probably be bound by the laws of his state in regard to modes of acquiring jurisdiction.

[3] Board of Public Works . Columbia College, 17 Wall. 521. It has sometimes been supposed to be necessary to show something more than non-residence and non-appearance, on the ground that the non-resident may be represented e. g. by a tenant. Board of Commissioners *v.* Welch, 40 Kans. 769.

[4] Wright *v.* Andrews, 130 Mass. 149.

[5] Galpin *v.* Page, 18 Wall. 350; Hood *v.* Hood, 11 Allen, 196; Don *v.* Lippman, 5 Clark & F. 1; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Douglas *v.* Forrest, 4 Bing. 686; ante, p. 289. See Burlen *v.* Shannon, 99 Mass. 200, 207. The domicil of a wife is that of her husband; hence the laws of the state in which he is domiciled will bind her as well as him in regard to the mode of acquiring jurisdiction, though she in fact reside elsewhere. Hood *v.* Hood, 11 Allen, 196. See also Dolphin *v.* Robins, 7 H. L. Cas. 390; Story, Confl. Laws, § 46.

[6] Rousillon *v.* Rousillon, 14 Ch. D. 351; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155.

of the state bound, without service of process or general appearance, by a judgment, beyond property attached and disposed of, would be extraordinary, unless the judgment was of the class which are conclusive inter omnes.[1] We give some illustrations of these rules.

In an action in Missouri upon a replevin bond made in Indiana it appeared that a statute was in force in the latter state which declared that when given for the stay of execution, such bond from the date of its execution 'shall be taken as and have the same force and effect of a judgment confessed in a court of record against the person or persons executing the same, and against their estates, and execution may issue thereon.' But the court in Missouri held that the act could have no extra-territorial effect; that it could not be sued upon as a judgment rendered in a sister state; and that it was not within the Constitution and act of Congress so as to be entitled to the same faith and effect which it would receive in Indiana.[2]

An action of debt under the following circumstances was brought in South Carolina[3] upon a judgment rendered in New York. The judgment sued upon was founded upon a joint note, and rendered against the makers jointly. Only one of the defendants was served or appeared. The other defendant pleaded that he was not notified; but a statute of New York was shown by which it was provided that in actions against two or more persons upon any joint obligation, contract, or liability, if the process issued against all the defendants should be duly served upon any of them the defendant so served should answer the plaintiff; and in such case the judgment, if rendered in favor of the plaintiff, should be against all the defendants, in the same manner as if all had been served with process. In another section of the same statute it was provided that such judgment should be conclusive evidence of the liability of the defendant personally served or appearing; but against every other defendant it should be evidence only of the extent of the plaintiff's demand, after the liability of such defendant should have been

[1] That includes judgments of divorce. Ante, p. 227.

[2] Foote v. Newell, 29 Mo. 400.

[3] Menlove v. Oakes, 2 McMull. 162.

established by other evidence. It was held that the judgment could have no extra-territorial effect.[1]

A case precisely similar occurred in 1846 in the Supreme Court of Connecticut[2] involving the same statute. It was urged as a reason for sustaining the action upon the judgment rendered in New York that by the laws of that state a similar suit might there be brought upon the judgment against all the defendants served and not served, and that the plaintiff would not there be permitted to recur to the original cause of action.[3] But the court replied that it was obvious (and the cases cited from Wendell's Reports showed this) that that action was prescribed there, not because there was in fact any judgment furnishing evidence of liability, but on grounds of local policy, as a convenient mode of proceeding for the recovery of the original debt from all the joint debtors. The regulation pertained to the remedy, and not to the merits, which could not be thus affected.

[1] The court by O'Neall, J. said: 'Reading the statute without the aid of note or comment I do not perceive how there ever could have been a dispute that as against the defendant [not served] the judgment was anything more than one in form, and that in substance it concluded nothing against the person not served. For the provision against every other defendant that it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence, plainly shows that it was intended only as a final judgment against the defendant served, and that everything was left open against the other. If this was not so, why was it provided that it should not even be evidence of the extent of the plaintiff's demand until after his liability was established by evidence? This was putting the plaintiff to prove his case from the beginning. When this is so, there can be nothing like a judgment in its appropriate legal sense. For according to that it is the final evidence of the court on the rights of the parties. Here, however, the whole matter is yet to be sifted before the court can decide that the defendant is at all liable.' In other words, such judgment on such proof establishes only the *amount* of the plaintiff's demand, not its justice; this may be disputed in an action upon the judgment. After referring to the decisions of the courts of New York (Carman *v.* Townsend, 6 Cow. 695; s. c. 6 Wend. 206; Halliday *v.* McDougall, 22 Wend. 270) in support of the above-stated view, Mr. Justice O'Neall proceeds: 'But be this as it may, it is very clear that the judgment thus obtained in New York can have no extra-territorial effect. For as against the party not served it cannot be regarded as a judgment further than as a mere means by which the partnership effects in New York are made liable to the joint debt. In this respect it is analogous to judgments in attachment, or decrees pro confesso against absent defendants in equity.' See Buckner *v.* Archer, 1 McMull. 85; Lesterjette *v.* Ford, ib. 86, note, cited by court.

[2] Wood *v.* Watkinson, 17 Conn. 500.

[3] Mervin *v.* Kumbel, 23 Wend. 293.

Cases of foreign attachment are closely allied to these; indeed, the principle pervading them is the same. A case already referred to[1] affords a good illustration. The plaintiff in New Hampshire sued upon a judgment rendered in Vermont. The original writ described the defendant as a resident of the former state; and the return upon it showed an attachment of his property in Vermont, and that he was then living out of that state. The court held that the action must fail in the absence of anything in the record showing personal notice to the defendant in Vermont, or appearance in the suit. It was said that the state of Vermont might assert jurisdiction over property situated within its territorial limits though the owner was not a resident of the state; and that so far the proceedings in that state were conclusive, but no further.[2]

We have already noticed the fact that the statement is sometimes made in the books that actions upon foreign attachment are proceedings in rem so far as the property attached is concerned; and we have shown that the statement is misleading.[3] The case of Woodruff *v.* Taylor[4] shows that legislation cannot change the nature of such proceedings. It was an action of trespass for taking certain personal property. The defendant pleaded that he had recovered judgment in the Court of King's Bench in Canada against one Smith, and that he had thereupon taken out a writ of fieri facias, which he caused to be levied upon the property in controversy in this suit as the property of Smith, and that the property was duly sold, and its avails paid into court by the sheriff's bailiff; that one Johnson then appeared and also claimed to be a creditor of Smith, and demanded an apportionment of the avails of the property, and that the court thereupon ordered an apportionment; that there was a law of Canada that when the proceeds of property sold on execution were thus paid into court, any person having any claim to the property might enter an appearance in court, and that if he neglected to do so and judgment of distribution was rendered, as had been done in this case, such judgment was conclusive

[1] Downer *v.* Shaw, 22 N. H. 277.
[2] Hall *v.* Williams, 6 Pick. 232, 241, cited by the court.
[3] Ante, pp. 49, 50.
[4] 20 Vt. 65.

both upon the title of the property and the amount of damages and costs, and was a bar against all persons to any and all actions founded upon any title, claim, or possession in or to the property. The plaintiff replied that the property in question belonged to himself and not to Smith, and that during all the time of the pendency of the proceedings in Canada he was a citizen and resident of the United States, and that he had no notice of such proceedings. The court upon demurrer held that the proceedings in Canada could not be considered as in rem, and that the replication was a good answer to the plea.

It is conceivable that an act of the legislature might declare such proceedings conclusive against all the citizens of the state; but statute could no further go. Unless the proceedings partake of the real character of proceedings in rem, as by being adjudications of prize or upon the status of a person, they can have no effect beyond the jurisdiction of the state except upon such non-residents as have been served with notice within the jurisdiction, or as have appeared in the case. The books contain a multitude of cases of this class; but they are not distinguishable in principle from the foregoing. All agree that such judgments, while conclusive between the parties in respect of the property attached, are void as judgments in personam unless founded upon personal service or appearance.[1]

The principle upon which these cases proceed is one of universal application both in regard to judgments of the sister states of the Union and to those of foreign countries. It may be thus stated: The legislature cannot give extra-territorial effect to any matters or proceedings as judgments which are not based on personal notice to or appearance by the (non-resident) defendant, and trial before a court of competent jurisdiction. These are facts necessary to the validity of every judgment in

[1] Galpin *v.* Page, 18 Wall. 350; Wright *v.* Andrews, 130 Mass. 149; Lincoln *v.* Tower, 2 McLean, 473; Westerwelt *v.* Lewis, ib. 511; Steel *v.* Smith, 7 Watts & S. 447; Miller *v.* Miller, 1 Bail. 242; Chamberlain *v.* Faris, 1 Mo. 517; Wilson *v.* Niles, 2 Hall, 358; Watkins *v.* Holman, 16 Peters, 25; Barrow *v.* West, 23 Pick. 270; Whiting *v.* Johnson, 5 Dana, 390; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155. The last case criticises Douglas *v.* Forrest, 4 Bing. 703, on this point. See also London Ry. Co. *v.* Lindsay, 3 Macq. 99; The Mecca, 6 P. D. 106, reversing 5 P. D. 28; Rousillon *v.* Rousillon, 14 Ch. D. 351.

personam when under consideration in the courts of any other state or country.[1] Indeed, judgments of the kind under consideration cannot be sued upon even in the court in which they were rendered,[2] unless there be clear statutory authority for such a proceeding.

§ 5. *Fraud.*

Whether the judgments of one state may be attacked on grounds of fraud, in the courts of another state, has been a subject of conflicting opinion.[3] The books contain many cases giving affirmative answers to the question.[4] Among the cases to the contrary a decision of the Supreme Court of Ohio may be mentioned.[5] The facts as they appear in the report of the case were these: The suit was debt upon a judgment recovered in Virginia. The defendant in his first plea pleaded in general terms that the judgment sued upon was obtained by fraud; and in the second and third pleas the fraud relied upon was specially alleged. Issue of fact was joined upon the first, and a demurrer was entered to the second and third pleas; and the demurrer was sustained.[6]

[1] Buchanan *v.* Rucker, 9 East, 192; s. c. 1 Camp. 65; Smith *v.* Nicolls, 7 Scott, 147; s. c. 5 Bing. N. C. 208; Becquet *v.* MacCarthy, 2 Barn. & Ad. 951; Vanquelin *v.* Bouard, 15 C. B. N. S. 341; Meeus *v.* Thellusson, 8 Ex. 638. See also the authorities cited in the notes to the preceding pages.

[2] Cooper *v.* Reynolds, 10 Wall. 308; Galpin *v.* Page, 18 Wall. 350. See also ante, p. 297, note 1. Such judgments become exhausted with the disposition of the property attached. Cooper *v.* Reynolds, supra.

[3] Where Congress has exclusive jurisdiction, it may prescribe the forum in which alone a judgment may be impeached for fraud, as e. g. in regard to fraudulent proceedings in bankruptcy. Burpee *v.* Sparhawk, 108 Mass. 111; Way *v.* Howe, Ib. 502; Corey *v.* Ripley, 57 Maine, 69; Ocean Bank *v.* Olcott, 46 N. Y. 12.

[4] Holt *v.* Alloway, 2 Blackf. 108; Borden *v.* Fitch, 15 Johns. 121; Andrews *v.* Montgomery, 19 Johns. 162; Shumway *v.* Stillman, 4 Cow. 292; Hunt *v.* Hunt, 72 N. Y. 217. See Lucas *v.* Bank of Darien, 2 Stewt. 280.

[5] Anderson *v.* Anderson, 8 Ohio, 108.

[6] 'It is remarkable,' said the court, 'that this question has never received a precise determination. The books abound so fully in the general doctrine that fraud avoids all judicial acts, and the proposition is so often asserted in terms which import that a judgment may for that cause be impeached collaterally, that one would expect to meet with several cases in which the question has been directly adjudged. In Borden *v.* Fitch, 15 Johns. 121, the defence was placed on the ground of want of jurisdiction in the Supreme Court of Vermont to decree a divorce; the defendant to the petition residing in another state, and having no notice of the proceedings. It is, however, *said* by the court that as the decree was obtained by false and fraudulent representations, it was void; and Fermor's Case, 3 Coke, 77, is relied upon as the

In a case in the Court of Chancery of New York[1] the complainant sought to restrain the defendants from prosecuting a suit in the Supreme Court upon a judgment recovered by them against the complainant in Massachusetts. His bill alleged that the judgment referred to had not been entered, filed, or docketed, at the time alleged in the declaration in the Supreme Court, or for many years thereafter; that no verdict was ever rendered, and that there had been no assessment of damages; that the alleged judgment had been entered some three years after the time stated in the declaration through the mistake or collusion of the clerk and by the fraud and procurement of the defendants in the present suit, or their agents, without lawful warrant or authority. The bill was demurred to, and the demurrer sustained on appeal.

Chancellor Walworth said that if the judgment had been

only authority. . . . But it is important to examine Fermor's Case. It was a bill in chancery to annul a fine; that is, it was a proceeding directly instituted to get rid of a judgment at law. Richard Fermor, the plaintiff, demised land to the defendant, Thomas Smith, for twenty-one years. Afterwards Smith fraudulently levied a fine to bar the plaintiff of the inheritance. And it appears to have been a great question then whether the plaintiff could be relieved even in chancery; for it is said that it was debated two days before all the judges of England and the barons of the Exchequer, when it was finally determined in his favor. So that Fermor's Case, so far from being an authority in support of the position that a judgment may be impeached collaterally, is an authority the other way. . . . With regard even to foreign judgments there appears now to be the strongest inclination to depart from the doctrine that they are only prima facie evidence.' After referring to cases already considered, holding to the conclusiveness of foreign judgments (Tarleton *v.* Tarleton, 4 Maule & S. 20; Boucher *v.* Lawson, Cas. temp. Hardw. 89; Martin *v.* Nicolls, 3 Simons, 458), the court proceeds: 'If such is the view which is now taken of the efficacy of foreign judgments, what shall we say of the attempt to impeach collaterally a judgment of a sister state, which has all the force and validity of a domestic judgment? That it cannot be vindicated either upon principle or authority, and that although loose dicta in abundance may be found to countenance it, yet that it has no root either in English or American jurisprudence.' The learned judge was mistaken in the statement that there had been no prior determination of the question at the time of the decision of this case. The point had been raised several years earlier in Massachusetts, and the same rule had been declared. McRae *v.* Mattoon, 13 Pick. 53. See Homer *v.* Fish, 1 Pick. 435. The court in the case cited said that if this were not the law there would be no end of litigation. If the first judgment were to be impeached for fraud, the second was liable to the same attack, and the third also, and so on. The law would become a game of frauds, in which the greatest rogue would become the most successful player. The doctrine of this case was recently held by the Supreme Court of Connecticut. Sanford *v.* Sanford, 28 Conn. 6, 28.

[1] Bicknell *v.* Field, 8 Paige, 440.

fraudulently entered, the proper remedy was an application to the court in Massachusetts to set it aside and take the spurious record off the files of the court.[1] It would not be according full faith and credit to the record of a judgment rendered in another state if the party against whom it purported to have been obtained should be allowed to show in another state that no such judgment was given or authorized to be entered by the court, but that it had been fraudulently made up and filed. The Supreme Courts of Connecticut and Georgia have recently declared a different rule;[2] and the Supreme Court of Iowa also have rendered a decision not in harmony with the New York case.[3]

The Iowa case referred to was a suit upon a judgment rendered in Kentucky in an action of slander. The court below, acting as a jury, found that the defendant, a resident of Kentucky when the suit for slander was begun, had removed to Iowa after employing counsel to defend the case; that subsequently he appeared, but the cause was passed; that afterwards he saw the plaintiff, who then assured him that he would dismiss the suit, and that he, the defendant, need not come back from Iowa to defend the case any further; that the defendant, relying upon this assurance, left for his home in Iowa; and that the plaintiff a year later called up the case in the absence of the defendant, without notifying him, and obtained the judgment now sued upon. The judgment of the court below upon these facts was in favor of the defendant; and this judgment was affirmed in the Supreme Court.[4] Mr. Justice Dillon, who delivered the

[1] See Nougué *v.* Clapp, 101 U. S. 551; Graham *v.* Boston R. Co., 118 U. S. 161; holding that a federal court cannot reverse or set aside a final judgment rendered by a state court having jurisdiction, on the ground that the judgment was obtained by fraud, where the injured party has had an opportunity to apply to the state court to have the judgment set aside.

[2] Pearce *v.* Olney, 20 Conn. 544; Engel *v.* Scheuerman, 40 Ga. 206. See Dobson *v.* Pearce, 12 N. Y. 156.

[3] Rogers *v.* Gwinn, 21 Iowa, 58.

[4] In Luckenbach *v.* Anderson, 47 Penn. St. 123, a suit upon a judgment rendered in New York, the defendant, a resident of Pennsylvania, offered to prove that he had been deceived and decoyed into New York for the purpose of procuring service on him, and that service was thus, and not otherwise, effected. The court held that it was not sufficient to show that service had been obtained by fraud, but that the justice of the claim should have been denied; White *v.* Crow, 110 U. S. 183; and that even both of these allegations

opinion in the case, after stating that the circuitous practice of a bill in chancery to enjoin the action at law was no longer necessary under the practice in that state, and that therefore if the facts pleaded were sufficient either in law or equity to constitute a defence the plaintiff must fail, passed on to the main point in question. He said that the courts were in the constant habit of relieving parties on equitable terms from judgments rendered against them in consequence of the fraudulent acts of the successful party or his attorney.[1] 'If the judgment sued on,' he continued, 'had been rendered by a court in Iowa, the facts found by the court below would be a good defence, at least in equity, to an action upon it, or sufficient to require a court of equity, upon petition filed for that purpose, to cancel it. And we cannot doubt that they would be so regarded by the courts of Kentucky if this action had been brought in that state, or if the defendant in that state had sought relief against the judgment. So that if we should hold as the appellant insists we should, we would be giving to the judgment of the court of one sister state a greater force and effect than we would give to a like judgment rendered by our own courts.'[2]

In a suit for an injunction against proceedings at law upon a judgment of a sister state founded upon facts similar to those in the case just under consideration the Supreme Court of Connecticut came to the same conclusion,[3] and sustained the injunction. The court said that this was no attempt to impeach the validity of the judgment of another state; that the court of equity did not presume to direct or control the court of law; but it considered the equities between the parties and acted upon the person, restraining him from instituting or prosecuting the action.

The question in its *legal* aspect at least has recently received an authoritative decision from the Supreme Court of the United

might not have been sufficient unless the judgment itself had been obtained by fraud. See also Crawford *v.* White, 17 Iowa, 560; Potter *v.* Parsons, 14 Iowa, 286.

[1] He cited Harshey *v.* Blackmarr, 20 Iowa, 161; 5 Am. Law Reg. N. S. 389; 2 Story Eq. §§ 194, 195; Pearce *v.* Olney, 20 Conn. 544; Dobson *v.* Pearce, 12 N. Y. 156; Milne *v.* Van Buskirk, 9 Iowa, 558.

[2] As to that see ante, p. 275, note 2.

[3] Pearce *v.* Olney, 20 Conn. 544. See Dobson *v.* Pearce, 12 N. Y. 156.

States, the court of last resort in matters relating to the federal Constitution and acts of Congress.[1] The court said that unless the merits were open to exception and trial between the parties, it was difficult to see how the plea of fraud could be admitted to the action upon a judgment of a sister state. Whether an action on such judgment could be restrained or not was not determined. It is probable that such an action could be restrained, or that fraud could be pleaded to the action, if it were made to appear that the fraud by which the judgment in the sister state had been obtained had not become known to the party wronged until the judgment was sued upon.

Apart from cases such as that last mentioned, it may now probably be considered as the established doctrine that judgments of one state cannot be avoided at law in another for fraud, while in full force where rendered, unless indeed the plea of fraud would there be good;[2] and as the same pleas would be good in a sister state that would be good in an action upon the judgment at home, it follows that if the judgment has been limited or restrained, as by injunction, in the domestic court the fact may be pleaded, or perhaps a similar proceeding may be maintained, in any other state when it is sought to enforce the judgment.[3]

As has already been intimated, it is probable that a differ-

[1] Christmas *v.* Russell, 5 Wall. 290; Hanley *v.* Donoghue, 116 U. S. 1, 4. See also Granger *v.* Clark, 22 Maine, 130; Boston & W. R. Co. *v.* Sparhawk, 1 Allen, 448; Atkinson *v.* Allen, 12 Vt. 624; Hammond *v.* Wilder, 25 Vt. 342; Embury *v.* Connor, 3 Comst. 522.

[2] Christmas *v.* Russell, supra, was based on the doctrine that fraud is no ground for the impeachment of a domestic judgment; and it would seem to follow from the doctrine of Hampton *v.* McConnell, 3 Wheat. 234, that if the law of any state is otherwise, and a plea of fraud good as to a home judgment, it would be good when pleaded to a judgment of such state in any other part of the Union. See Hanley *v.* Donoghue, 116 U. S. 1, 4. Comp. Ferguson *v.* Crawford, 70 N. Y. 253, where the rule that recitals of jurisdiction in records of sister state judgments are not conclusive is based upon the ground that such recitals would not be conclusive (in New York) in the case of a domestic judgment.

[3] It has been held that equity will restrain a party from proceeding at law upon a judgment of a sister state before he has made any attempt to enforce it; and this too though the attack was directly upon the merits of the case. Winchester *v.* Jackson, 3 Hayw. 305; s. c. Cooke, 420. For what constitutes the fraud which may be availed of, see ante, pp. 217–219; and see Cammell *v.* Sewell, 3 Hurl. & N. 617; Patch *v.* Ward, L. R. 3 Ch. 203.

ent rule may prevail concerning judgments rendered in foreign countries; for the rule in the American states, as we have seen, is founded upon the fundamental law of the land, which expressly applies only to the judgments of the sister states. Something could no doubt be said against permitting a party to impeach for fraud a judgment rendered in a foreign country, and still in force, if the party had had opportunity to attack the judgment there, and had not improved it; still, fraud will at all times be a most persuasive objection to a judgment rendered by a court sitting in a foreign land.[1]

Indeed, there is no doubt that it may be shown against a foreign judgment in personam that it was obtained by some fraud not involved in the examination of the merits of the case, such as preventing the complaining party from presenting the merits of his case,[2] or imposing upon the jurisdiction of the court,[3] or corruption of the court, or collusion between counsel, or the like.[4] But it would seem to be a sound view of the law that this should be the limit, as appears to be the case in regard to questions of fraud relating to domestic judgments. 'Where is litigation to end,' it has been asked by high authority, 'if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh [collateral] action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given?'[5] But this view, though elsewhere strongly supported,[6] has been denied, and the contrary decided in set terms; the English Court of Appeal declaring that though the question of fraud was raised in the foreign court, and a decision reached that fraud had not been

[1] See Cammell v. Sewell, 3 Hurl. & N. 617.

[2] Ochsenbein v. Papelier, L. R. 8 Ch. 695.

[3] Dunlap v. Cody, 31 Iowa, 260; Pfiffner v. Krapfel, 28 Iowa, 27; Wanzer v. Bright, 52 Ill. 35; Luckenbach v. Anderson, 47 Penn. St. 123; ante, p. 304, note 4.

[4] United States v. Flint, U. S. Circ. Ct. Cal. 1876; 1 Bigelow, Fraud, 88, note.

[5] Flower v. Lloyd, 10 Ch. D. 327, 333, C. A.

[6] Castrique v. Behrens, 3 El. & E. 709; s. c. 3 L. J. Q. B. 163; United States v. Flint, supra; 2 Story, Equity, pp. 873, 876, 13th ed.; Hood v. Hood, 11 Allen, 196; 110 Mass. 463.

perpetrated, the complaining party would be heard again in England upon the subject.[1] This view cannot be sustained in the United States in regard to judgments of the sister states, at all events.[2]

§ 6. *Merger.*

Suppose, however, the plaintiff, instead of suing upon the foreign judgment, prefers to bring suit de novo on the original cause of action, will the former judgment in his favor estop him? Let us as heretofore answer the inquiry by considering, first, the judgments of colonies and foreign countries, and secondly, those of the sister American states.

This question was directly raised in the English Court of Common Pleas in the year 1839 in the well-known case of Smith *v.* Nicolls.[3] This was an action on the case for an unfounded charge, as alleged in the first count of the declaration, of illegal trading and seizure of the plaintiff's ship, the Admiral Owen. Among other things the defendant pleaded substantially that the plaintiff had impleaded him in the Vice-Admiralty Court of Sierra Leone, upon the same cause of action, and had obtained judgment; and that this still remained in full force and effect. The issue was finally raised upon demurrer to a replication to this plea. Judgment was given for the plaintiff. Chief Justice Tindal said that the broad question was whether the plea of judgment recovered was such as to deprive the plaintiff of the right of suing in England upon his original cause of action, or whether it amounted to more than an agreement upon the quantum of damages. No case, he said, had been cited for the defendant, and none could be found, to show that a judgment of this kind stood upon the same footing as a judgment recovered in one of the superior courts of Westminster. The ground upon which a judgment recovered in the courts of England was held to be a bar was that the nature of the debt or demand was

[1] Abouloff *v.* Oppenheimer, 10 Q. B. D. 295, C. A.; Hunt *v.* Hunt, 72 N. Y. 217; ante, p. 254, note.

[2] Christmas *v.* Russell, 5 Wall. 290; Hood *v.* Hood, 11 Allen, 196; 110 Mass. 463.

[3] 7 Scott, 147; s. c. 5 Bing. N. C. 208.

changed; the plaintiff had a higher remedy; he had a judgment of a court of record upon which an immediate execution might be issued, and consequently it would be very superfluous, and give encouragement to much useless litigation, and create unnecessary delay and expense, if he might commence de novo and bring a second suit for the same debt or ground of complaint. It had therefore always been held that where a plaintiff had obtained judgment in a court of record, whether in an action for debt or for damages, the original cause of action became merged or extinguished in the higher claim. The Vice-Admiralty Court, he stated, was not in the first place a court of record; and its judgment could not be put upon higher ground than one obtained in a common-law proceeding of a colonial court, if as high. It was familiar to all that the only mode of proceeding upon such a judgment in England was by bringing an action upon it, in which action the judgment of the colonial court formed the evidence. 'If the judgment,' the learned Chief Justice now observed, 'has not altered the nature of the rights between the parties, why is the plaintiff to be deprived of the right which every subject of her Majesty has, to sue in the courts of this country for the debt due to or damage sustained by him? It appears to me that he has the option of suing upon his original ground of action, or bringing an action of assumpsit upon the foreign judgment.' This was the line of argument advanced by the other members of the court; and the case has been uniformly followed in England.[1]

The same doctrine was held in Texas prior to the admission of that state into the Union.[2] And the court of Massachusetts has held that where judgment was rendered for the plaintiff in Canada, in a suit instituted subsequently to one brought in

[1] Bank of Australasia *v.* Harding, 9 C. B. 661; Robertson *v.* Struth, 5 Q. B. 941; Godard *v.* Gray, L. R. 6 Q. B. 139; Nouvion *v.* Freeman, 37 Ch. D. 244, C. A. See also the earlier cases of Hall *v.* Odber, 11 East, 118; Plummer *v.* Woodburne, 4 Barn. & C. 625; s. c. 7 Dowl. & R. 25; Obicini *v.* Bligh, 8 Bing. 335. If the plaintiff, instead of suing upon the original cause of action, elects to sue upon the judgment which he has obtained, 'he must show that the matter has been adjudicated upon by a competent court, and that the adjudication is final and conclusive.' Nouvion *v.* Freeman, supra, Cotton, L. J.

[2] Wilson *v.* Tunstall, 6 Tex. 221; Frazier *v.* Moore, 11 Tex. 755.

Massachusetts for the same cause of action a plea of the foreign judgment, if it has not been satisfied, is no defence.[1]

An examination of the American cases, however, shows a different rule in relation to the judgments of the sister states. The case of Bank of the United States *v.* Merchants' Bank of Baltimore[2] is a leading authority. To an action of assumpsit in Maryland the defendant pleaded as follows: 'That the plaintiff ought not to maintain its action inasmuch as the plaintiff, after the day of issuing forth the writ in this cause, that is to say, on the 31st day of March, 1842, in a certain court of record called the District Court for the City and County of Philadelphia, in the State of Pennsylvania, impleaded the said defendants in a plea of trespass on the case for the not performing the same identical promises and undertakings, and each and every of them, in the declaration mentioned. That afterwards, to wit, on the 23d day of April, 1842, the plaintiff by the consideration and judgment of the said court recovered on the said plea against the said defendants $159,676.20, for its damages which it had sustained on the occasion of the not performing the same identical promises and undertakings in the declaration mentioned. And that the said judgment still remains in full force and effect, and not the least reversed, satisfied, or made void.' To this plea a demurrer was entered and sustained in the court below; but the plea was sustained on appeal.[3]

[1] Wood *v.* Gamble, 11 Cush. 8.

[2] 7 Gill, 415.

[3] After considering and overruling several objections to the form of a plea, as that it should have been pleaded puis darrein continuance, and should have alleged that the foreign court had jurisdiction, the court said: 'And if it be true that the judgment possessed in the state where it was rendered the attribute of conclusiveness; that it had there the rank and dignity of a debt of record; that it was not re-examinable and could not be controverted with respect to the merits of the original demand; that the parties were precluded from going behind the judgment into an investigation of the original cause of action; and that by the act of Congress of the 26th of May, 1790, the same effect is to be attributed to the judgment by the courts of Maryland, when it is introduced into the tribunals of that state as evidence, or relied upon in pleading, to which it would be entitled in the state where it was pronounced; and that it has all the operation and force in Maryland that could be claimed for it in Pennsylvania as conclusive in relation to the merits of the claim and the subject-matter of the suit, — it follows as an irresistible conclusion, upon the undoubted principles of the common law, that it must operate here as an extinguishment of the original demand. We think it therefore to be clear, upon the true exposition of the first section of the fourth article of the

In a similar action in Connecticut the defendant pleaded a judgment against himself in New York; but it appeared upon the trial that an appeal from this judgment was pending. It was found that by the laws of the state of New York the appeal did not supersede the judgment, but that execution might issue thereon at any time upon the application of the plaintiff. Counsel for the plaintiff contended that the judgment was not final and conclusive in New York; that an action could not there be maintained upon it; and that a transcript of the record would show an appeal taken, a lis pendens, or an imperfect judgment, which could not estop the parties. But the court by its Chief Justice said that the effect of the appeal depended upon the character of the jurisdiction of the New York court. If by the laws of New York a case carried before it by appeal is to be retried as upon original process, and it had jurisdiction to settle the controversy by a judgment of its own and to enforce the same by its own process, the appeal, like an appeal under the Connecticut statutes from a justice of the peace to the superior court, would vacate the judgment of the inferior court. But if the appeal was in the nature of a writ of error, and only carried up the case for a correction of errors, and for an adjudication upon the question whether the judgment should be affirmed, reversed, or modified, and the court had only the corresponding powers, then such appeal would not vacate or suspend the judgment; and the removal of the case to a higher court would no more bar an action upon the judgment than the pendency of a

Constitution of the United States and the act of Congress passed in execution of the power granted by the Constitution, and the doctrine of extinguishment as established by the common law, that the appellee could not have maintained an action of assumpsit upon the cause of action exhibited in the record if the judgment set forth in the plea had been obtained in Pennsylvania prior to the commencement of the suit.' The court added that, though the judgment in question was obtained after the present suit was instituted, the defendants were authorized in specially pleading the matter. In McGilvray *v.* Avery, 30 Vt. 538, the defendant was sued simultaneously upon the same cause of action in New Hampshire and Vermont. Judgment having first been rendered in the former state, it was held that this was a bar to the further prosecution of the action in Vermont, though the mere pendency of the suit was not even ground for an abatement. Green *v.* Starr, 52 Vt. 426; Walsh *v.* Durkin, 12 Johns. 100; Hatch *v.* Spofford, 22 Conn. 485, cited by the court. See also Weeks *v.* Pearson, 5 N. H. 324; Embree *v.* Hanna, 3 Johns. 101.

writ of error at common law. That such an action under those circumstances would not be barred, he said, was well settled.[1] The judgment was therefore in favor of the defendant.[2]

In the above-mentioned cases the defendant was served with process or appeared in defence. What effect an opposite state of facts would produce should be noticed. In a case in New Hampshire, already referred to,[3] the plaintiff sued in assumpsit, and it appeared from facts agreed that a recovery in Maine upon the same cause of action had been obtained by the plaintiff against the same defendants. The record did not show any notice or appearance by either defendant; but it did state that one of them was a resident of New Hampshire. After holding that in such case there would be no presumption in favor of notice to or appearance by this non-resident defendant, the court held that the judgment in Maine was not an estoppel against the suit in New Hampshire in respect of the last-mentioned party.[4]

The rule, then, in regard to judgments for the plaintiff, rendered in the courts of the sister states of America, is that they work an estoppel to any suit between the same parties upon the original and same cause of action, provided they are valid and conclusive where rendered and based upon personal notice or

[1] Case *v.* Case, Kirby, 284; Sloan's Appeal, 1 Root, 151; Curtiss *v.* Beardsley, 15 Conn. 523.

[2] See Scott *v.* Pilkington, 2 Best & S. 11.

[3] Rangely *v.* Webster, 11 N. H. 299.

[4] The court said: 'If the judgment is to be regarded as a mere nullity, when an attempt is made to enforce it by an action here, the question arises, Must it not be considered equally a nullity when the defendants set it up as a bar or answer to an action upon the original note upon which that judgment was rendered? Can it be treated by one party as valid, while as it respects the other party, in reference to the same subject-matter, it is held to be void? Can it be said when the action is brought here upon the judgment that the original demand does not rest in judgment for the reason that the judgment is void, while at the same time, if the action were brought upon the original demand, it may be legally asserted by the same party that the demand has passed into judgment, and that the action cannot be maintained for that cause? . . . To maintain the position that in the case of an action upon the judgment the judgment is void and may be so treated, but that when the action is upon the original demand the same judgment is valid, is to maintain that the form and manner of the action adopted determine the character of the former judgment, its validity or invalidity, instead of the facts and circumstances attending its recovery.' The question had been determined the same way a few years earlier. Whittier *v.* Wendell, 7 N. H. 257. To the same effect is Kane *v.* Cook, 8 Cal. 449.

appearance, otherwise not.[1] But in the case of judgments rendered in foreign countries, or in colonies or dependencies, there is no estoppel to a fresh suit for the same demand, where the same plaintiff recovered in the prior action.[2]

§ 7. *Judgment for Defendant.*

There is another rule laid down by the better cases, as we have seen, that if the judgment in question was given for the defendant it will always be an estoppel, whether it was rendered in a court of a foreign nation, a colony, or a sister state, if it was final and conclusive there.[3] It is perfectly clear that this should be true in the case of judgments of our sister states, by reason of the constitutional provision and the act of Congress; but in regard to the other classes it may be asked, Why should judgment for the plaintiff cause no estoppel to a fresh suit, while the opposite rule prevails where it is in favor of the defendant? The distinction (bearing in mind the fact that the doctrine of merger has no application) we conceive to be this: Any party may waive an advantage in his own favor provided he does not thereby interfere with another's rights. The plaintiff waives such an advantage when he elects to bring a fresh suit upon

Baxley *v.* Linah, 16 Penn. St. 241; Barnes *v.* Gibbs, 2 Vroom, 317; Brown *v.* Lexington & D. R. Co., 2 Beasl. 191; Rogers *v.* Odell, 39 N. H. 457; Child *v.* Eureka Powder Works, 45 N. H. 547; North Bank *v.* Brown, 50 Maine, 214; Cincinnati R. Co. *v.* Wynne, 14 Ind. 385; Lapham *v.* Briggs, 27 Vt. 26; Nichol *v.* Mason, 21 Wend. 339. But the doctrine of extinguishment, which results from the Constitution and act of Congress, must be taken with some qualification. A judgment in one state cannot, it should seem, extinguish a *judgment* in another state. Weeks *v.* Pearson, 5 N. H. 324. In this case the plaintiff had first brought his action in New Hampshire. He then sued in New York on the judgment there rendered. Not having satisfied the same, he sued again in New Hampshire, on the first judgment. The defendant pleaded in bar the judgment rendered in New York; but the court held the plea bad. Some courts, however, hold that a judgment upon a judgment rendered in a sister state not only merges the earlier judgment, but with it all rights, such as liens on land, created by it. Gould *v.* Hayden, 63 Ind. 443, citing many cases, most of which, however, are cases in which the first judgment was rendered in the same state as the second. See Story, Conflict of Laws, p. 823, note, 8th ed.

[2] But it is held in Louisiana, under the Code, that a judgment of a foreign country extinguishes the original cause of action, so that suit must be brought upon the judgment. Jones *v.* Jamison, 15 La. An. 35.

[3] Frayes *v.* Worms, 10 C. B. N. S. 149; Plummer *v.* Woodburne, 4 Barn. & C. 625; s. c. 7 Dowl. & R. 25.

the original cause of action; and this without injury to the rights of the defendant. He risks losing his case without the power, it would seem, of proving a larger claim than the amount for which the former judgment was rendered.[1] The reason why he could prove no more than the sum recovered in the foreign suit is that this would be to discredit the foreign judgment upon the merits; and this could not be done against the objection of the defendant, as we have seen. It is quite clear, then, that while the plaintiff waives his rights, he does not endanger those of the defendant.

§ 8. *Garnishment or Trustee Process.*

We have already mentioned several matters in regard to which the rules of law are common to all the classes of foreign judgments, such as these: that in the case of proceedings in rem the judgments of courts of competent jurisdiction are conclusive of the change of property; and that in the case of proceedings in personam only such judgments as are founded upon personal notice or appearance are held conclusive. There are also other matters to be noticed in which the same principles prevail in the three classes of foreign judgments. We proceed to notice some of the rules which apply to proceedings by garnishment or trustee process.

It is generally declared that where a debt or demand has been recovered by garnishment in a foreign court the recovery is a protection to the garnishee or trustee against his original creditor.[2] A case before Lord Mansfield may be stated in illustration of this principle.[3] Le Chevelier was assignee in bankruptcy of one Dormer. A creditor of Dormer, to whom he (Dormer) was indebted before the bankruptcy, attached a sum of money in the hands of one Lynch, a debtor of Dormer, after the bankruptcy. After this Lynch came to England, whereupon Dormer's assignee brought the present action against him to

[1] Smith *v.* Nicolls, 7 Scott, 147, 166, Tindal, C. J.

[2] Taylor *v.* Phelps, 1 Har. & G. 492, 502; Le Chevelier *v.* Lynch, 1 Doug. 170; Phillips *v.* Hunter, 2 H. Black. 402; Holmes *v.* Remsen, 4 Johns. Ch. 460; s. c. 20 Johns. 229; Embree *v.* Hanna, 5 Johns. 101; McDaniel *v.* Hughes, 3 East, 367; Wilkinson *v.* Hall, 6 Gray, 568; Barney *v.* Douglas, 19 Vt. 98; Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, ib. 594.

[3] Le Chevelier *v.* Lynch, 1 Doug. 170.

recover the debt owing by him to the bankrupt. The assignee contended that as the debt for which the money was attached was due before the bankruptcy, the foreign creditor was only entitled to his share of the dividend under the commission of bankruptcy, and could not attach the money in the hands of Lynch because the right to the money owing by Lynch was vested by the assignment in him, the assignee, for the benefit of all the creditors. But Lord Mansfield, while admitting the proposition to be true generally, said that if after the bankruptcy and before payment to the assignee money owing to the bankrupt out of England was attached bona fide by regular process according to the law of the place, the assignee could not recover the debt.

Among the American cases Hull *v.* Blake[1] is a leading one. In that case a bona fide indorsee of a note made in Georgia brought an action in Massachusetts against the maker thereof. The defendant pleaded that he had been summoned as garnishee of the payee of the note in a suit in Georgia by a creditor of the payee; that he had answered that he owed the note in question; and that judgment had thereupon been rendered against him, in which it was declared that the same should operate as a bar in favor of the garnishee against the plaintiff or his indorsee. The indorsement had been regularly made to the present plaintiff before the proceedings by garnishment were instituted. Counsel for the plaintiff urged that this being the fact, the defendant had ceased to be the debtor of the payee, i. e. the indorsement having been made to the plaintiff before the garnishment, the payee's interest had been passed away, so that there was nothing for the process to operate upon; and that the courts of Georgia could not construe their statutes in such a way as to injure the citizens of other states. The statute of Georgia does not seem to have been before the Massachusetts court. Chief Justice Parker said that if by the laws of Georgia, in force when the note was made, payment to the payee after indorsement would discharge the same, and such payment were actually made, proof of these facts would protect the defendant from a second suit, though brought by an innocent indorsee who had paid value for the note. Such a law would be extraordinary, but if it existed

[1] 13 Mass. 153.

it must prevail, since the law of the country where the contract was made would govern its performance. And the plea was allowed.[1]

In a subsequent case in the same state[2] involving the same general question it appeared that no execution had issued against the garnishee in the sister state; and an examination of the statute of the state having convinced the court that the judgment operated only as a lien on the fund (a promissory note) in the hands of the garnishees, and that even that was provisional, to take effect only in case other funds first chargeable should prove insufficient to pay the debt, it was held that the defendants' plea of the judgment against themselves as garnishees was no bar. Chief Justice Shaw said that upon general principles one who had not yet been compelled to pay, and who might never be obliged to pay to another the debt attached, seemed in no condition to deny the original creditor's right to recover his debt absolutely and forever though he might have good right to insist that proceedings should be stayed while his hands were tied.

In a case in the Supreme Court of New York,[3] a suit against the maker of an unnegotiable promissory note, the defendant pleaded a judgment in Vermont against him as garnishee of a

[1] 'The question, then,' he continued, 'in the present case would seem to be whether such was the law of Georgia with respect to a negotiable promissory note at the time this contract was made. That it was the evidence resulting from the judgment of the court of that state which had the jurisdiction of the subject-matter is, perhaps, conclusive. At least it ought to be so considered in favor of a party who has been there concluded by it, and has no means of avoiding the execution of it; unless it should be made to appear that he aided in the procurement of such a judgment by withholding facts essential to the right determination of the court. In this case a true disclosure appears to have been made; and although the law of this state would not authorize a similar judgment upon similar facts, the law of Georgia may be different, and must be presumed to be so; because a judicial court of that state of competent jurisdiction has so declared it.' (*a*) He then ruled that it was unnecessary for the defendant to have taken the opinion of the court of last resort in Georgia, and that a judgment fairly rendered would protect him as well as if actually satisfied.

[2] Meriam *v.* Rundlett, 13 Pick. 511.

[3] Prescott *v.* Hull, 17 Johns. 284.

(*a*) The foreign judgment itself is the highest evidence of the law; and it is not permissible to give other evidence of what the law is. Davidson *v.* Sharpe, 6 Ired. 14.

creditor of the plaintiff; to which the plaintiff replied that before the suit in Vermont was brought he had assigned the note to A and L, for whose benefit the present suit was prosecuted. The court held that the replication would have been good had it averred that the debt was assigned for a valuable consideration; the suit being prosecuted in the interest of the assignees, who were not before the court in Vermont and were not parties to the proceedings there. The court would presume that the rights of the assignees would have been recognized and protected had the assignment been known at the trial in Vermont. The proceedings were therefore inter alios; and it was not drawing them into question to hold that the assignees were not concluded.

§ 9. *Privity.*

In respect of the doctrine of privity the question has frequently arisen whether the relation exists between administrators of different countries of the same person's estate, so as to make a judgment in *favor* of an administrator or executor in one country an estoppel to a suit against another in another country; or whether judgment *against* an administrator or executor in one country may be a ground of action and therefore conclusive on the merits against another in another country.

The case of Stacy *v.* Thrasher[1] was a demurrer to an action in Louisiana upon a judgment rendered in Mississippi against an administrator appointed under the laws of that state; the action in the former state being brought by the same plaintiff against the Louisiana administrator of the same intestate. In the language of the court the question was: 'Will an action of debt lie against an administrator in one of these United States on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?' The answer was in the negative.[2]

[1] 6 How. 44.

[2] After showing that the action could not be maintained in the case of a judgment rendered in a foreign country, the learned judge proceeded to consider the particular case before him of a judgment of a sister state. He said: 'The parties to these judgments are not the same. Neither are they privies. (1 Greenl. Ev. § 523.) . . . Privies are divided by Lord Coke into three classes: first, privies in blood; second, privies in law;

The doctrine of this case is well settled.[1] And the dictum expressed by the court that an executor in one state and an administrator de bonis non, with the will annexed, in another state are so far in privity that a judgment in favor of the former may be a ground of action in favor of the latter has been followed in several cases.[2] But such cases, as we have elsewhere seen, are of doubtful authority.[3] As for executors appointed under the same will in the same state they are in privity, it is said, and the principles of estoppel apply;[4] but the case just cited establishes a contrary rule in the case of executors qualified in different states.[5] The court in Hill *v.* Tucker, cited in the note, readopts the language quoted from Stacy *v.* Thrasher,

and third, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the same principle; namely, that a party claiming through another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor through whom he claims. An executor or administrator suing or sued as such would be bound by a verdict against his testator or intestate, to whom he is privy in law. . . . An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other in law or in estate. They receive their authority from different sovereignties, and over different property. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property encumbered by the same debts as in the case of an administrator de bonis non, who may be truly said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties. Yare *v.* Gough, Cro. Jac. 3; Snape *v.* Norgate, Cro. Car. 167; Dykes *v.* Woodhouse, 3 Rand. 287. [But see Coleman *v.* McMurdo, 5 Rand. 51; ante, p. 148.] . . . A judgment may have the "effect" of a lien upon all the defendant's lands in the state where it is rendered, yet it cannot have that effect on lands in another state, by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a state can only affect persons within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta. It cannot be even prima facie evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.'

[1] See Dent *v.* Ashley, Hempst. 54; Taylor *v.* Barron, 35 N. H. 484; Grout *v.* Chamberlin, 4 Mass. 613; Talmadge *v.* Chapel, 16 Mass. 71; Pond *v.* Makepeace, 2 Met. 116; Low *v.* Bartlett, 8 Allen, 259; Hill *v.* Tucker, 13 How. 466; McLean *v.* Meek, 18 How. 16; Rosenthal *v.* Renick, 44 Ill. 202; Latine *v.* Clements, 3 Kelly, 426.

[2] Latine *v.* Clements, supra; Hill *v.* Tucker, supra.

[3] Ante, p. 148.

[4] Hill *v.* Tucker, supra.

[5] See also Jackson *v.* Tiernan, 15 La. 485.

and says that for the same reasons it holds that a judgment against an executor appointed in one state would not be conclusive against another qualified in another state. And the same is true of trustees appointed by court to receive legacies for minors and an administrator of the same estate qualified in another state; there is no privity between them.[1]

§ 10. *Judgments of foreign Courts of inferior or limited Jurisdiction.*

We have hitherto had under consideration the judgments of superior courts, or courts of record, of other states and countries; the judgments of courts of the sister states of limited jurisdiction, particularly those of justices of the peace, remain to be examined. Are these within the Constitution and act of Congress in regard to conclusiveness? The question has been answered both in the affirmative and in the negative.

The question arose in 1824 in the Supreme Court of Massachusetts.[2] The case cited was an action of debt upon a judgment rendered before a justice of the peace in Connecticut. The question raised by the pleadings was whether the judgment declared on was conclusive evidence of debt so as to admit of no inquiry into the merits of the demand upon which it was founded. The court said that it was perfectly clear that the Constitution settled only this, that the acts, records, and judicial proceedings authenticated as Congress should prescribe were to be received as conclusive evidence of the doings of the tribunals; and it was equally clear that the *effect* of such acts was to be determined by Congress. The act of 1790 prescribed the mode of authentication, and in the opinion of the court had not determined the effect of judgments of the sister states; but upon this point the court yielded rather 'to the authority than to the reasons' of the court at Washington.[3]

[1] Low *v.* Bartlett, 8 Allen, 259; Rosenthal *v.* Renick, 44 Ill. 202.

[2] Warren *v.* Flagg, 2 Pick. 448.

[3] 'Certainly we think,' continued Chief Justice Parker, 'the judicial proceedings referred to in the Constitution were supposed by the Congress which passed the act providing the manner of authenticating records to have related to the proceedings of courts of general

A few years later the Supreme Court of New Hampshire adopted the same rule upon a similar issue.[1] The court by its Chief Justice said: 'We suppose it to be clear that until the record is duly authenticated in the manner Congress has prescribed, the judgment can stand on no better ground than any other foreign judgment. But such is the nature of the mode prescribed in the statute of the United States for the authentication of records that in our opinion the record of a justice of the peace cannot be so authenticated, and that therefore the judgment of a justice of the peace is not within those provisions.'

This doctrine is maintained in the more recent case of Taylor *v.* Barron, just cited, in regard to the conclusiveness of a decision given by commissioners appointed by a Court of Probate in a sister state. The plaintiff in that case brought an action of assumpsit in New Hampshire against an administrator, who pleaded that the alleged claim had been preferred before commissioners in Vermont appointed by a Court of Probate of compe-

jurisdiction, and not those which are merely of municipal authority;(*a*) for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall be also a certificate of the judge, Chief Justice, or presiding magistrate, that the attestation of the clerk is in due form. This is founded upon the supposition that the court whose proceedings are to be thus authenticated is so constituted as to admit of such officers; and the act has wisely left the records of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every state, to be governed by the laws of the state into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the Constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than prima facie evidence of debt.'

[1] Robinson *v.* Prescott, 4 N. H. 450. The doctrine is reaffirmed in Mahurin *v.* Bickford, 6 N. H. 567; Taylor *v.* Barron, 30 N. H. 78.

(*a*) The act of May 26, 1790 (1 Stat. at L. 122), reads as follows: 'That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' The act of March 27, 1804 (2 Stat. at L. 298), extended these provisions to 'all records and exemplifications of office books . . . not pertaining to a court.'

tent jurisdiction, and by them rejected; and that by the laws of Vermont the decision was a final and conclusive judgment forever barring the plaintiff. Remarking upon the subject of the dependence of a judgment of another state upon the mode of its authentication for its force and effect, Mr. Justice Bell said that the act of Congress prescribes a mode of proof which implies that there must be a clerk and a judge, Chief Justice, or presiding magistrate; while it must have been well known that justices of the peace, and many other inferior tribunals, have no clerk; and many public boards, exercising judicial powers, have no officer that can with any propriety be denominated a judge or presiding magistrate. The omission to provide for cases of these classes, he thought, must have been intentional. And when the act provided that the records and judicial proceedings, *authenticated as aforesaid*, shall have faith, etc., it evidently designed to omit and leave unprovided for the proceedings of such courts as did not admit of such authentication. But the plea in the case did not show that there had been a trial on the merits of the claim, or that there was a trial at all; and on this ground it was overruled. The court refrained from expressing an opinion whether it would have been a good plea if it had alleged a trial on the merits. To make the plea effectual the court said that it should at least have shown that there had been an adjudication sustaining a defence to the claim which in its nature would be equally a defence in New Hampshire.[1]

The court of South Carolina has also declared that judgments of justices of the peace of sister states are prima facie evidence. The question, however, in the case referred to was not in regard to their conclusiveness, but whether they were evidence at all, and a proper ground of action.[2]

[1] It had been held in an earlier case in the same state that where a party, a citizen of New Hampshire, presented a claim to the commissioner of an insolvent estate in Vermont where the intestate resided, and the administrator having appealed from the commissioner's decree allowing the same, the case had been tried on its merits, and judgment finally rendered in the Supreme Court of Vermont in favor of the administrator, that judgment constituted a good defence to the same claim by the same party; and that an ancillary administrator in New Hampshire might plead such judgment in bar of the allowance. Goodall *v.* Marshall, 14 N. H. 161.

[2] Clark *v.* Parsons, Rice, 16; Lawrence *v.* Gaultney, Cheves, 7. See also Snyder *v.* Wise, 10 Barr, 157.

The same doctrine was declared in Vermont in the early case of King *v.* Van Gilder.[1] But this case has been overruled, and the courts of that state now hold that the judgments rendered in other states by justices of the peace acting within their jurisdiction are conclusive.[2] In Starkweather *v.* Loomis the court says: 'When the subject came to be examined upon principle, and in connection with the statutes that give large jurisdiction to justices, this court felt constrained to decide that though a justice has no clerk, yet where the law requires him to keep records he must be considered as his own clerk; and if he has no seal, he may use a common seal, or may certify that he has no seal of office, as an excuse for omitting to attach one to his copies of record.'

What the doctrine in New York is does not appear to have been determined. In the case of Thomas *v.* Robinson,[3] in which a question of the proper way of showing the jurisdiction arose, the court remarked that in order to prove what faith and credit should be given to a judgment rendered by a justice of the peace in another state it would be necessary to produce and prove the authority under which they were organized and proceeded. But this language was evidently used in reference to the question of jurisdiction.[4]

A decision to the same effect concerning the conclusiveness of justices' judgments of other states, that this must depend upon the law creating the courts, was recently given in Texas.[5] The meaning of this evidently is that they will be accorded the same force and effect in Texas which they receive at home upon producing and proving the law of the state. And the court of Ohio has in a dictum maintained the doctrine that such judgments are not subject to examination in the courts of other states.[6] In a subsequent case[7] this question was raised by a demurrer: What is the character of a debt evidenced by a tran-

[1] D. Chip. 59.

[2] Starkweather *v.* Loomis, 2 Vt. 573; Blodget *v.* Jordan, 6 Vt. 580; Carpenter *v.* Pier, 30 Vt. 81.

[3] 3 Wend. 267.

[4] See also Cole *v.* Stone, Hill & D. 360.

[5] Beal *v.* Smith, 14 Tex. 305.

[6] Silver Lake Bank *v.* Harding, 5 Ohio, 545.

[7] Stockwell *v.* Coleman, 10 Ohio St. 33.

script of a judgment rendered by a justice of the peace of the state of Indiana? The court after citing the case of Silver Lake Bank *v.* Harding, just referred to, as authority for the doctrine that a justice's judgment was a judicial proceeding entitled to full faith and credit, said that the debt founded upon the transcript of the judgment should therefore be regarded as of the same character which it would have in Indiana; if it had the conclusive character of a judgment of a court of record there, it must receive the same consideration in Ohio.

Aside from judicial construction of the act of Congress on this subject it seems quite clear that Congress must have intended the judgments of inferior courts not of record by the expression 'judicial proceedings,' in connection with the context. The act to which we refer[1] relates only to proceedings of the courts. The language is: 'That the records and judicial proceedings of the courts of any state shall be proved . . . by the attestation of the clerk and the seal of the court, *if there be a seal*,' etc. The word 'records' then can only mean the memorials of the superior courts or courts of record. The words 'judicial proceedings' follow in the conjunctive, and not in the disjunctive; so that they must mean something additional to the idea conveyed by the word 'records.' The only other class of courts being those usually denominated 'inferior,' it follows that they must have been intended. The position is fortified by the presence of the words above italicized, 'if there be a seal,' which all courts of record have.[2]

Now the second part of the act declares that 'the said records and *judicial proceedings*' shall have the same force and effect as in the state from whence they are taken. It is plain that if as 'judicial proceedings' the judgments of inferior courts are embraced by the language concerning authentication in the first half of the act, they also fall within the meaning of the last half of the act concerning the effect to be given the judgments of the sister states.

[1] May 26, 1790 (1 Stat. at L. 122).

[2] It seems to us that there is no good ground for the objection that judgments of justices of the peace cannot be authenticated in the manner prescribed. A seal is not required; the justice may act as his own clerk, as was suggested in Starkweather *v.* Loomis, 2 Vt. 573; and there can be no impropriety in denominating him 'judge.'

But if the position taken by some of the courts be correct that judgments of justices of the peace cannot be authenticated in the manner prescribed in the act of Congress, and that therefore they cannot be embraced in either part of it, it appears to be a good answer that by the Constitution 'the acts, records, and judicial proceedings' of each state are entitled to 'full force and effect' everywhere else in the Union. Judgments of inferior courts must be embraced in this broad language;[1] and 'full force and effect' can mean nothing less than the force and effect which would be given in the domestic courts. It is quite certain, however, that the judgments of all courts, whether of record or not, which possess the necessary machinery for carrying out the act of Congress in regard to authentication are conclusive of the merits, when properly authenticated.

Under this head of judgments of courts of inferior jurisdiction may also be classed the judgments of foreign consuls. In Forbes *v.* Scannell[2] it appeared that after an execution of an assignment in Canton, China, before a United States consul, a controversy arose before the consul between the assignees and a citizen of the United States residing in Canton, in which was involved the question of the validity of the assignment. The consul delivered an opinion holding the assignment valid. At the time of the assignment certain goods belonging to the insolvents were at sea; and upon their arrival in port they were seized on execution by third parties, who were aware of the claim of the assignees. These third parties in a suit to recover damages for the seizure of the goods now maintained that the assignment was void. The assignees, however, contended that this question had been conclusively settled by the decision of the consul. But the court held the contrary.[3]

[1] The clause in the Confederation, from which the one in the Constitution was taken, contained, after 'judicial proceedings,' the words, 'of the courts and magistrates of every other state;' and these words were probably stricken out as redundant. It is plain from the fact that the word 'courts' was stricken out as well as 'magistrates,' that no distinction was intended to be drawn between the judgments of the superior and those of the inferior courts, by the framers of the Constitution, in omitting the phrase referred to in the Confederation.

[2] 13 Cal. 242.

[3] Baldwin, J. said: 'It is urged that the decision of this court is as conclusive of the questions of local law decided as would be that of any other

The case is different where the statute has given such courts the necessary authority to try certain causes; and in such case a judgment for the defendant, if final and conclusive where rendered,[1] or for the plaintiff with satisfaction, will bar all further litigation for the same cause of action in the domestic courts if the consular court acted within its jurisdiction.[2]

The jurisdiction of inferior courts of the sister states may in all cases be examined,[3] subject perhaps to limitations of the kind mentioned heretofore in considering the judgments of the superior courts.[4] And it should be observed that in matters concerning which the jurisdiction of courts of record is special and limited the proceedings stand upon the footing of the proceedings of inferior courts.[5]

court as to the law of its jurisdiction; but it seems that an appeal lies from the consul to the United States commissioner. (*a*) And we are not aware that the rule which accords the force of definitive exposition of the local law to the decision and judgment of the courts of the local jurisdiction has ever extended so far as to give that sanction to the judgment of a subordinate tribunal of the municipality or territory. The decision of the consul is doubtless entitled to some weight; but we are not prepared to hold it as conclusive of the general question adjudicated by him.'

[1] So it would seem from analogy to the judgments of colonial courts. See Plummer *v.* Woodburne, 4 Barn. & C. 625.

[2] Barber *v.* Lamb, 8 C. B. N. S. 95.

[3] Wheeler *v.* Raymond, 8 Cow. 311; Denning *v.* Corwin, 11 Wend. 647; Smith *v.* Fowle, 12 Wend. 9; Thomas *v.* Robinson, 3 Wend. 267; Cleveland *v.* Rogers, 6 Wend. 438; Sheldon *v.* Hopkins, 7 Wend. 435; Pelton *v.* Platner, 13 Ohio, 209; Foster *v.* Glazener, 27 Ala. 391; Gunn *v.* Howell, ib. 663; Shivers *v.* Wilson, 5 Har. & J. 130; Thatcher *v.* Powell, 6 Wheat. 119; Shufeldt *v.* Buckley, 45 Ill. 223; Draggoo *v.* Graham, 9 Ind. 212; Cone *v.* Cotton, 2 Blackf. 85, note; Martin *v.* Kennard, 3 Blackf. 430; Grant *v.* Bledsoe, 20 Tex. 456; Beal *v.* Smith, 14 Tex. 305.

[4] Ante, pp. 206, 207.

[5] Commonwealth *v.* Blood, 97 Mass. 538; ante, pp. 204, 205.

(*a*) A similar fact in Bank of Australasia *v.* Nias, 16 Q. B. 717, is mentioned as having force in favor of the conclusiveness of the judgment.

PART II.

RIGHTS ARISING FROM ESTOPPEL BY DEED.

PART II.

RIGHTS ARISING FROM ESTOPPEL BY DEED.

CHAPTER VII.

PRELIMINARY VIEW: THE SEAL.

We now enter upon the consideration of a class of rights arising from estoppel very different from that under consideration in the preceding pages, — so different that as soon as we descend from the general idea of an 'indisputable admission,' sometimes (but with doubtful propriety [1]) said to pervade all estoppels, into the details of the subject, we shall seldom be able to trace the resemblance of the two classes by more than remote analogies. And even in respect of the general connecting link between them, that is, that certain facts are to be taken as true specifically and not in the alternative,[2] there is a wide difference as regards the operation by which the estoppel

[1] The objection to calling an estoppel an admission arises from the fact that an admission is evidence in favor of a stranger; while in most cases the fact admitted under an estoppel, like the estoppel itself, is res inter alios towards a stranger, and hence inadmissible even as evidence. A true judgment in rem may avail a stranger, as we have seen; so an estoppel in pais by concealment or denial of one's title to or rights in property could be used against one by a stranger, — e. g. a creditor of the purchaser, — as a mere admission, possibly as more. And there may be other cases in which the admission in the estoppel may avail a stranger; but the term should only be applied to an estoppel with caution in any case. In many cases it is obviously inapt, as in regard to a judgment. The danger of calling a judgment an admission is seen in Rogers *v.* Grannis, 20 Ala. 247, where an intelligent court was led to say that because an admission by an administrator was not evidence against his successor in the administration, a judgment, being also an admission, was not evidence.

[2] Ante, p. 4.

is effected. In the case of a judgment or verdict estoppel the question in dispute is submitted to others to decide;[1] in the case of estoppels by deed the parties transact the whole business themselves, and agree between themselves upon the facts that shall thenceforward be unquestioned. The one case arises from the judgment of the law, the other from the contract of the parties.

Estoppel by deed, it need hardly be said, though sometimes called in the older books estoppel by matter in writing,[2] originated by virtue of that which constituted the writing a deed, to wit, the seal. Seals, which came into regular use in England with the Norman Conquest,[3] though they were not unknown in the Anglo-Saxon time, were at first used only by the king and the great men of church and state. We are told upon trustworthy authority that in the time of Henry the Second[4] it was considered improper for a knightling ('militulus') to have a seal; Richard de Luci, the king's justiciar and predecessor of the famous Glanvill, in a trial of title to land turning scornfully upon such a person who professed to have a seal, and affirming that the time was when only the king and his great men had seals.[5] And with this he overruled the objection to certain written gifts of lands, that they were without seals. Now, it is to the fact that the seal was once the mark of authority and greatness, rather than to the fact that it was a seal, or that its use was a solemn act, that we are probably to trace the origin of the effect of the instrument as matter of evidence. In the Dialogue of the Exchequer, a work of the year 1176,[6] it is directly affirmed that the acts and records of the Exchequer derived their conclusive effect from the image of the king stamped upon the seal there kept and used.[7]

[1] In the case of a judgment against the defendant the whole proceeding of course, as well as the result, is nolens volens as to him.

[2] See Coke, Litt. 352 a; Comyn's Digest, Estoppel (A. 2); Stratton v. Rastall, 2 T. R. 366; Lampon v. Corke, 5 Barn. & Ad. 606, 611. That a mere writing releasing rights of action concerning land though valid does not affect the land in the hands of a grantee of the releasing party, see Cobb v. Fisher, 121 Mass. 169. But a writing was conclusive evidence in early times.

[3] A. D. 1066.

[4] A. D. 1154–1189.

[5] Placita Anglo-Normannica, 175, 177; History of Procedure in England, 717.

[6] Ante, p. 37, note.

[7] Stubbs's Select Charters, 176, 2d ed.

By the close, however, of the twelfth century seals had come into general use by landholders and by traders, and especially by the money-lending Jews; the idea having now gained ascendency that the seal itself, besides affording authentication, somehow imported verity, and gave to the instrument to which it was appended its peculiar efficacy. From that time until the present day the use of a seal has been attended with the gravest consequences even in cases in which the fact of its use would at first have brought upon its owner nothing but ridicule and contempt. This view of a seal as importing of itself absolute verity reached a height of absurdity when, from the majestic seal of the king, of an archbishop, or of an abbot of a monastery, affixed and suspended to a parchment with a dignity befitting the owner, it came to pass that the scrawl of a scrivener's pen would answer the same high purpose. And when it came to this, perhaps before it had quite come to this, the revulsion of intelligent men had become such as to cause the legislatures of some of our states (as of Tennessee) to abolish the distinction in favor of seals, and to declare that the special efficacy of an ordinary instrument should no longer depend upon the addition of wax, wafer, or scrawl. In such states the question of estoppel by statements and recitals in written instruments must depend upon intention, to be determined (from the writing itself) by the consideration whether the statement or recital was intended to furnish a basis of action by the parties; in other words, whether they intended to bind themselves by contract that the facts should be as stated.[1]

[1] That the estoppel prevails in Tennessee, though the seal has lost its force there, see Rankin *v.* Warner, 2 Lea, 302; Buchanan *v.* Keines, 2 Baxter, 275. Perhaps, however, the estoppel would there arise only upon proof that the recital had been acted upon by the party alleging it. In this particular the estoppel would resemble an estoppel in pais. Indeed, the courts in recent times appear inclined to treat the estoppel by deed as resting on contract, a perfectly intelligible basis, — a basis upon which a large class of estoppels is arising. Carpenter *v.* Buller, 8 Mees. & W. 209, 212, where Parke, B. says that a recital in an instrument not under seal may be such as to be conclusive. See Delaney *v.* Dutcher, 23 Minn. 373; Stewart *v.* Metcalf, 68 Ill. 109. But it should be clear that the recital in a simple contract is of the essence of the contract; otherwise there will be no estoppel to dispute it. Ferguson *v.* Milliken, 42 Mich. 441; Snowden *v.* Grice, 62 Ga. 615. See Newton *v.* Marshall, 62 Wis. 8.

Other cases of estoppel by deed which stand or may well stand upon grounds independent of the seal, such as the effect of a warranty of title by a grantor of land conveying in fee before he has acquired the title, remain the same, no doubt, so far as not affected by legislation, as before; the estoppel still arises.[1] It is only history and association that require the consideration of such cases under the head of Estoppel by Deed. It should perhaps be added that the reader must not be misled into supposing that the author means to suggest that, in this letting down of the physical properties of the seal any more than in the loss of the idea from which it originally derived its efficacy, there has been any relaxation of the doctrine of estoppel by deed where that has not been effected by act of the legislature.[2] Besides, as we have intimated in the note, the doctrine has still sufficient reason for existence when based (not on the seal, but) on contract; and it may be doubted if there is now much difference concerning recitals and statements between the law of those states in which the seal still retains its old efficacy and of those in which it has been made useless.[3]

An estoppel by deed[4] is a preclusion against the competent parties to a valid sealed contract,[5] and their privies, to deny its force and effect by any evidence of inferior solemnity.[6] Such cannot allege any title or right in derogation of the deed. Thus, a grantor by deed with general warranty cannot set up any encumbrance against the grantee, not excepted in the deed,[7] such as a right of way.[8] Taking the definition and rule as the

[1] Jones *v.* Morris, 61 Ala. 518.

[2] See e. g. Cobb *v.* Fisher, 121 Mass. 169; Snow *v.* Moses, 53 Maine, 546.

[3] Indeed, one who derives title under a will is bound thereby as much as he would be under a deed. Taking under the will one is not permitted to dispute its provisions. Hill *v.* Den, 54 Cal. 6; Noe *v.* Splivalo, ib. 207; Hyde *v.* Baldwin, 17 Pick. 303; post, chapter 21.

[4] Attested, if of land, in a contest against a purchaser from the grantor. Chamberlain *v.* Spargur, 86 N. Y. 603. But an unattested deed would be good against the *grantor*, to raise an estoppel upon its covenants of warranty. Ib. p. 608; Wood *v.* Chapin, 3 Kern. 509.

[5] This includes deeds of record. Kepley *v.* People, 123 Ill. 367.

[6] An estoppel in pais may be set up in bar of an estoppel by deed. Platt *v.* Squire, 12 Met. 494. But comp. Philbrick *v.* Shaw, 63 N. H. 81, 88.

[7] Fisher *v.* Mining Co., 97 N. Car. 95; s. c. 94 N. Car. 397.

[8] De Rochemont *v.* B. & M. R., 64 N. H. 500. Indeed, it has been held that a grantor cannot allege, in a suit for breach of warranty by his grantee, that a prior conveyance by the same grantor of the same premises was invalid. Hodges *v.* Latham, 98 N. Car. 239. But why not?

premise, we purpose in considering the subject before us to make two short general divisions, and to show,—

1. To whom the doctrine applies;

2. To what it applies.

It is obvious that under the first division we must present the doctrine in its relation, first, to parties; secondly, to privies. Under the second division we purpose to show, first, the limitations of the doctrine; secondly, the force of the doctrine in regard to recitals; thirdly, its force concerning after-acquired estates under conveyances of land; and fourthly, its force in relation to the release of dower.

The estoppel arising from the relation of landlord and tenant and the like, not being dependent upon the existence of a deed, will be considered under Part III., Estoppel in Pais. The subject will, however, be incidentally presented as occasion may require in the present Part II., and particularly under Title by Estoppel.

First, then, concerning the doctrine of estoppels by deed in relation to parties and privies.

CHAPTER VIII.

PRELIMINARY VIEW: PARTIES AND PRIVIES.

THE general rule upon this subject is the same as in the case of estoppels by record, namely, that only the parties to a deed[1] and those in privity with them can be bound by or take advantage of the estoppel created by the instrument. The estoppel must be mutual.[2] We proceed now to consider the meaning and operation of this rule.

§ 1. *Parties.*

The rule is illustrated by a case which recently came before the Supreme Court of Pennsylvania.[3] The action was ejectment by Struthers against one Clark and his tenants. It appeared that Clark, being owner of the land in question, conveyed it by deed to certain persons some of whom subsequently joined in a mortgage with him to a *stranger*, which mortgage contained a recital that he (Clark) was the owner of eleven twenty-fourths of the land. Before this mortgage was recorded, but after its execution, the property was attached and sold on execution to the plaintiff. The tenants now alleged that Clark had no title when the attachment was served; to which the plaintiff replied

[1] A distinction has been made in regard to recitals of boundaries upon streets, making the estoppel available for some purposes in favor of the town in which the land lies. Tobey *v.* Taunton, 119 Mass. 404. But the distinction is not sound. See post, p. 371, note 1. The rule that one who receives a conveyance of land subject to a mortgage, which he thereby assumes, conclusively admits the binding force of the mortgage in favor of the mortgagee (Freeman *v.* Auld, 44 N. Y. 50; Johnson *v.* Thompson, 129 Mass. 398; Smith *v.* Graham, 34 Mich. 302; Hill *v.* Minor, 79 Ind. 48, 55; Price *v.* Pollock, 47 Ind. 362; post, chapter 10) is commonly based on the ground of implied covenant with the mortgagee. But even on grounds of estoppel the rule is sustainable, since the admission or representation is intended for the mortgagee.

[2] Millard *v.* McMullin, 68 N. Y. 346; Glasgow *v.* Baker, 72 Mo. 441.

[3] Sunderlin *v.* Struthers, 47 Penn. St. 411.

the recital in the mortgage as an estoppel. But the court held the defence of the tenants good.[1]

This doctrine is also illustrated by a case in Ohio.[2] An action had been brought for the assignment of dower in land which the defendant held under a sheriff's deed made by virtue of an execution against the plaintiff's late husband. The defendant sought to protect himself under a deed from the deceased and release of dower, made before the sheriff's sale but after the judgment, to third persons. The court refused to allow the alleged defence to be made. The defendant, the court observed, had never possessed himself of the title which he relied upon; he did not claim under it, but by a title adverse to it and paramount. He could not make the release available as a grant,

[1] Mr. Justice Agnew, in delivering the opinion of the court, said: 'There was an interval of time between the date of the last deed and the date of the mortgage during which the tenancy was wholly gone. How was the tenancy revived? Only by the simple declaration of Clark that he owned eleven twenty-fourths, and the declaration or certificate of his co-mortgagors to the same fact. Thus, the mere written certificate, as it were, of persons who were neither parties nor privies in estate, or in the suit brought to recover the estate, is made evidence to reinvest Clark with title to these eleven parts; and even more, it was laid upon the jury with a binding instruction, on the ground that it operated as an estoppel upon persons who, after Clark had parted with his title, stood in no relation or privity to him. . . . On what principle of evidence or law his naked declarations or those of a stranger could be used, first to renew or restore the tenancy, and then to estop, it is difficult to perceive. The effect of it is to let into possession one who has shown no title whatever, contrary to the first principle of the law of ejectment, and thus to oust persons holding no fiduciary relation, and thereby to affect the title of Clark's vendees, who, after their deeds, became the landlords.'

Mr. Justice Strong, in a concurring opinion, forcibly replied to the argument of the plaintiff that it was a case of estoppel in pais. 'Nor was the recital,' he said, 'an admission or declaration made to the plaintiff at the time of the sale, or at any previous time. He was not a party to the mortgage. It was altogether res inter alios acta. If he saw it and did not know it was a mistake or a falsehood, still he was not warranted in relying upon it. I agree that if the plaintiff had been induced to purchase by anything said by these mortgagors at the sale, or by representations made by them to him previously, they would have been bound by their declarations, and precluded from averring the contrary to the prejudice of his title. But it is an unprecedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one if others choose to rely upon it. If every man may be held liable not only to parties and privies to his deed, but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it.'

[2] Kitzmiller *v.* Rensselaer, 10 Ohio, St. 63.

for he was not a party to it; nor could the release operate in his favor by way of estoppel, for a stranger could not be bound by or take advantage of an estoppel.

Persons acting under the authority of a grantee by deed are not regarded as strangers.[1] In the case cited one Osgood had executed a deed of land to a corporation styled the 'Proprietors of the South Chapel in Fryeburg.' In this deed it was stipulated that a church should be erected on the land 'for the use of the Methodist Episcopal Society so long as they shall furnish preachers acceptable to a majority of the proprietors.' The church was built, and after having been occupied for a number of years was abandoned and suffered to fall out of repair. After a considerable interval the church was repaired by the defendants under the direction of persons acting as the superintending committee of the proprietors, and reoccupied; whereupon the heirs of Osgood brought the present action of trespass for the entering and repairing the church. The defendants alleged the deed as an estoppel; while the plaintiffs contended that they were strangers, and not entitled to take advantage of it. The court decided in favor of the defendants, saying that it could not be maintained that they, acting under persons who were at all events de facto the superintending committee of the proprietors, a majority of whom were among the original associates and proprietors, were such strangers and wrongdoers as to deprive them of the right to assert the estoppel.

On the other hand, a person is not to be regarded as a party to a deed executed in his favor, if he does not accept or claim under it.[2] The plaintiff in the first case referred to brought an action for dower, claiming under a mortgage deed by her late husband to one Ware, which by assignment to K and sundry mesne conveyances was traced to the defendant. Counsel on her behalf contended that the defendant was estopped by this mortgage to deny the plaintiff's right to dower in the land. But the court said that such could not be its legal effect. There was no evidence in the case that K ever claimed title under this mortgage, or in fact that he had any knowledge that it had ever

[1] Osgood *v.* Abbott, 58 Maine, 73. St. Louis R. Co. *v.* Belleville, 122 Ill. 376.

[2] Kidder *v.* Blaisdell, 45 Maine, 461;

been assigned to him. It was not recorded until March 10, 1858, nearly forty years after its date. From whence the demandant obtained this instrument did not appear, nor did it appear that the tenant had any knowledge of its existence before it was produced on trial. Under this state of facts he was not affected thereby.

A deed further, like a judgment, estops the parties only in the character in which they execute it.[1] The plaintiff as administratrix of the estate of her husband executed a deed of real estate containing a covenant of warranty against the demands of all persons claiming under herself. She now brought an action for dower in the land, and the court held that she was entitled to recover. Mr. Justice Cooley, who delivered the judgment, said that there was no ground for putting a construction upon the deed that would estop the plaintiff from claiming dower. The deed had been given by her in her representative character as administratrix and signed by her as such. The covenant against her own acts referred to herself in such representative character, and it was not to be presumed that she had precluded herself from asserting her individual rights. Though it was true the covenant was not essential to the validity of the deed, still it was not meaningless, and might under some circumstances, if the sale had proved defective, have given the grantee a right of action.[2]

The same principle appears in the case of Metters *v.* Brown.[3] That was an ejectment to recover possession of a piece of land, in which the plaintiff sued as administrator of his mother. He sought to recover the premises by reason of a term of which it was said his mother died possessed, the same devolving upon him as administrator. The defence was that the defendant had been in possession under a mortgage by the plaintiff in his mother's lifetime. The defendant contended that the plain-

[1] Wright *v.* De Groff, 14 Mich. 164; Doe d. Hornby *v.* Glenn, 1 Ad. & E. 49; Smith *v.* Penny, 44 Cal. 162; Hall *v.* Matthews, 68 Ga. 490; Goldsmith *v.* Coleman, 57 Ga. 425; Trentman *v.* Eldridge, 98 Ind. 525, 531.

[2] Wright *v.* De Groff, supra. See also Carithers *v.* Stuart, 87 Ind. 427, where it is held that a wife may buy and enforce a note, and foreclose a mortgage securing it, though she had joined her husband in executing the mortgage. Trentman *v.* Eldridge, 98 Ind. 525, 531.

[3] 1 Hurl. & C. 686.

tiff was estopped from claiming the term by reason of his mortgage. But the court held that there was no estoppel.[1]

Again, in Trentman *v.* Eldridge,[2] where a wife had joined her husband in a mortgage with warranty upon his property to secure a debt of his, it was held that she was not estopped to claim the land in another capacity. The effect of the deed upon the wife, it was observed, did not extend beyond her interest in the specific property described therein; rights vesting in her in some other character than that of wife were not affected by what she had done as wife.

If, however, a guardian sell land of his ward, with a covenant that he was duly authorized to sell the premises, he cannot afterwards set up a claim to the land in his own right.[3] The court observed in the authority cited that the case came within the well-established rule that a party was not allowed to plead or prove any matter inconsistent with the terms of his deed.[4]

[1] 'In our opinion,' said Channel, B. speaking for the court, 'the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger; and therefore the rule as to estoppel does not apply. For whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger.' But it is held that a lease executed by one as agent of the lessor estops him from setting up any claim to the land inconsistent with the lease. Blanchard *v.* Tyler, 12 Mich. 339.

[2] 98 Ind. 525.

[3] Heard *v.* Hall, 16 Pick. 457. Comp. the case of one suing as next friend, for an infant. Lee *v.* Turner, 71 Texas, 264. The guardian's settlement, of course, is not conclusive upon the ward. Henley *v.* Robb, 86 Tenn. 474, 483.

[4] 'On this principle,' said Mr. Justice Wilde, 'the case of Poor *v.* Robinson, 10 Mass. 131, was decided, a case in most respects precisely similar to the present. In that case the demandants claimed as children and heirs of Thomas Poor, their father; and the tenant produced a deed of release from two of the demandants, by which they released and quitclaimed unto him all the right of which the testator, their father, died seised in and to sundry lots of land including the demanded premises. It appeared that the testator was disseised at the time of death, and so the deed was inoperative to pass the right of the testator; but it was held to be good by way of estoppel to extinguish the right descending from the testator to his two children, the executors, and thus far the title to the tenant was confirmed, the court holding that they were not entitled to recover against their own bargain and contract with the tenant. That case and this, excepting in two particulars, are similar, and depend on the same principle. In Poor *v.* Robinson the executors sold in their capacity as executors; in this case the petitioner sold in his capacity as guardian. But in two particulars the cases differ. In Poor *v.* Robinson the executors' deed purports to convey the right only of which the testator died seised. But in the present case the petitioner's deed purports to be an unqualified grant of the land to the grantee in fee simple.

Further, in order to work an estoppel upon the parties to a deed they must be sui juris. Hence, at common law a married woman, according to the weight of authority, is not estopped at law or in equity by her covenants of warranty,[1] or by her recitals,[2] except in regard to her equitable separate estate.[3] The case first cited was an ejectment; the plaintiff giving in evidence a deed from the defendant and her husband by which they conveyed the premises in fee to the plaintiff, with warranty. The defendant offered to prove an outstanding title, but it was objected that she was estopped by the covenants in her deed. The objection was overruled. Chief Justice Spencer said that it was a settled principle of the common law that coverture disqualified a woman from entering into a contract or covenant personally binding upon her. She might at common law pass her real property by fine; and under the New York statute she might,

It purports to pass the whole estate, and it is utterly inconsistent with the plainer import of the grant to allow the petitioner now to show that only a part of the estate passed by that conveyance. The other particular in which the cases differ is of more importance. In Poor *v.* Robinson there do not appear to have been any express covenants. But in this case the petitioner expressly covenants that he is lawfully authorized and empowered to make sale of the granted premises; that is, of the whole estate. Most certainly he was not so authorized; and this covenant operates to avoid circuity of action by way of rebutter, and estops the petitioner from setting up his title from Pitts Hall.'

[1] Goodenough *v.* Fellows, 53 Vt. 102 (equity); Trentman *v.* Eldridge, 98 Ind. 525, 531; Carithers *v.* Stuart, 87 Ind. 427 (a striking case); Jackson *v.* Vanderheyden, 17 Johns. 167; Sparrow *v.* Kingman, 1 Comst. 242; Wallace *v.* Miner, 6 Ohio, 367; Wight *v.* Shaw, 5 Cush. 56; Lowell *v.* Daniels, 2 Gray, 161, overruling Fowler *v.* Shearer, 7 Mass. 21; Barker *v.* Circle, 60 Mo. 258; Bank of America *v.* Banks, 101 U. S. 240; Wood *v.* Terry, 30 Ark. 385; Harden *v.* Darwin, 77 Ala. 472; Gonzales *v.* Hukil, 49 Ala. 260; Patterson *v.* Lawrence, 90 Ill. 612; Strawn *v.* Strawn, 50 Ill. 33. The last-named case holds that though the wife release dower and join in the warranty, she will not be estopped to claim an interest distinct from that of dower; and the deed not being an estoppel upon the wife, is not an estoppel upon the husband's heirs against the widow. McLeery *v.* McLeery, 65 Maine, 172.

[2] Bank of America *v.* Banks, 101 U. S. 240.

[3] Jones *v.* Reese, 65 Ala. 134; Howell *v.* Hale, 5 Lea, 405; Powell's Appeal, 98 Penn. St. 403, 413. So by estoppel in pais by conduct. Saratoga Bank *v.* Pruyn, 90 N. Y. 250, 255. See, however, Tolman *v.* Smith, 74 Cal. 345. The distinction (apart from statutes) between the wife's separate estate of courts of equity and other general estate of her own must be noticed In regard to the former the wife is practically sui juris, but not in regard to the latter. See 2 Story's Equity, §§ 1378–1401. As to statutory separate estates, see Kelly *v.* Turner, 74 Ala. 513; Harden *v.* Darwin, 77 Ala. 472.

in conjunction with her husband, on due examination do the same. But the deed could not operate as an estoppel to her subsequently acquired interest. A contrary doctrine prevails in some states;[1] and in Indiana it is said (upon a supposed but mistaken analogy to the case of releasing dower at common law)[2] that estoppel may arise against a married woman irrespective of covenants of warranty.[3] Under recent statutes a married woman may now bar herself in Massachusetts by a warranty deed from claiming under an after-acquired title;[4] and this would probably be true in many other states. And at common law a wife joining with her husband fully in conveying her own land will be barred by the deed, though not liable on the covenants.[5]

An infant also, not being sui juris, will not be estopped by his deed during his infancy, nor afterwards unless he has expressly or impliedly ratified it.[6] Thus, an apprentice bound to service until twenty-one years of age will not be estopped by a recital of his age in the indenture.[7]

The question whether an estoppel of this kind[8] is available

[1] Dukes v. Spangler, 35 Ohio St. 119, 127; Hill v. West, 8 Ohio, 222; Massie v. Sebastian, 4 Bibb, 433. See Strong v. Waddell, 56 Ala. 471; Cowles v. Marks, 53 Ala. 499; also cases cited infra, p. 352. In Strong v. Waddell it was held that a married woman purchasing land and executing with her husband a note and mortgage to secure payment will be estopped to set up coverture against a bill for foreclosure. If the deed of a married woman be invalid, she will not be estopped to claim in opposition to it, even in equity and against an innocent purchaser from her vendee. Merriam v. Boston R. Co., 117 Mass. 241.

[2] No doubt, however, a married woman under the statutes might be barred by recitals as well as by warranty.

[3] King v. Rea, 56 Ind. 1, 19, explaining Nicholson v. Caress, 45 Ind. 479, and denying Jackson v. Vanderheyden, 17 Johns. 167. See also Reeves v. Howes, 104 Ind. 435.

[4] Knight v. Thayer, 125 Mass. 25.

[5] Doane v. Willcutt, 5 Gray, 328, 332; Bruce v. Wood, 1 Met. 542; Raymond v. Holden, 2 Cush. 264; Lufkin v. Curtis, 13 Mass. 223; Lithgow v. Kavenagh, 9 Mass. 161; Powell v. Monson & M. Co., 3 Mason, 347; post, chapter 12.

[6] Cook v. Toumbs, 36 Miss. 685.

[7] Houston v. Turk, 7 Yerg. 13. But both infants and married women may sometimes be bound by an estoppel in pais, according to many authorities. See post, Part III.

[8] The state may of course be estopped by judgment. Cunningham v. Shanklin, 60 Cal. 118; Newport Bridge Co. v. Douglass, 12 Bush, 673; Taylor v. Wallace, 31 Ohio St. 151. See Boyd v. Alabama, 94 U. S. 645. So also against inconsistent acts in pais. Chope v. Detroit Plankroad Co., 37 Mich. 195; Vardier v. Railroad Co., 15 S. Car. 477, 483. See Reid v. State, 74 Ind. 252. But the United States cannot be estopped by proceedings against its tenants or agents, though they notify the government to defend. Carr v. United States, 98 U. S. 433.

against the state arose in Commonwealth v. André.[1] It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu André, his heirs and assigns, with warranty, a certain tract of land. André at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons intestate the attorney-general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect of title in any person who could by law hold it. But the court held the commonwealth estopped by its deed. 'The deed of the commonwealth,' said the Chief Justice, 'to the very persons now defending as heirs to André, to whom and to whose heirs the grant was made, is, we think, an estoppel against setting up the alienage of those persons as the ground of recovery.' And this is perhaps the better opinion.[2] But in North Carolina and in some other states a different doctrine prevails; it is there held that an estoppel does not operate against the state, or its assignee.[3] Clearly the state cannot be estopped by unauthorized acts of its officers.[4]

§ 2. *Privity.*

The doctrine that the estoppel upon the parties to a deed operates also upon their privies is illustrated by the leading case

[1] 3 Pick. 224.

[2] Carver v. Astor, 4 Peters, 1, 87; Branson v. Wirth, 17 Wall. 32, 42; Folger v. Palmer, 35 La. An. 743; State v. Ober, 34 La. An. 359; State v. Taylor, 28 La. An. 462; Penrose v. Griffith, 4 Binn. 231; Nieto v. Carpenter, 7 Cal. 527; Magee v. Hallett, 22 Ala. 699; State v. Brewer, 64 Ala. 287; Opin. in resp. to Governor, 49 Mo. 216; St. Paul R. Co. v. First Div. St. Paul & P. R. Co., 26 Minn. 31 (against the United States). See Bates v. Illinois Cent. R. Co., 1 Black, 204; Lindsey v. Hawes, 2 Black, 554; Railroad Co. v. Schurmeir, 7 Wall. 272; Land Co. v. Saunders, 103 U. S. 316; note 8, p. 340.

[3] State v. Williams, 94 N. Car. 891; State v. Bevers, 86 N. Car. 588; Den d. Candler v. Lunsford, 4 Dev. & B. 407; Wallace v. Maxwell, 10 Ired. 110; Doe d. Taylor v. Shufford, 4 Hawks, 116; State v. Graham, 23 La. An. 402; People v. Brown, 67 Ill. 435; Alexander v. State, 56 Ga. 478. See Crane v. Reeder, 25 Mich. 303; Farish v. Coon, 40 Cal. 33.

[4] Pulaski v. State, 42 Ark. 118; Attorney-Gen. v. Marr, 55 Mich. 445; State v. Brewer, 64 Ala. 287, citing United States v. Kilpatrick, 9 Wheat. 735. In State v. Brewer it is declared that those who deal with officers of the state are bound to know the extent of their authority.

of Taylor *v.* Needham.[1] The question raised on demurrer was whether the plea of non demisit was good when pleaded by an assignee who had had the estate of the lessee conveyed to him, which estate had been created by indenture. It was held that it was not.[2]

An illustration of the doctrine of privity is also found in the case of Bates *v.* Norcross,[3] which was a writ of entry. The defendant relied upon a deed from one Packard, to whom the premises had been conveyed by Ebenezer Davison with general covenants of seisin and warranty. He then proved that after Davison died the plaintiff married his only daughter and heir at law, and that she received assets by descent from her father of a greater value than the land in controversy. The plaintiff relied upon a title paramount to that of Davison. The defendant now

[1] 2 Taunt. 279.

[2] Mansfield, C. J. said: 'There is nothing more clear than that where a lessee takes an estate by indenture, he is not at liberty to plead nil habuit in tenementis, nor in any way to dispute the title of his lessor. Now, this plea puts in issue amongst other matters the title of the lessor. It is truly stated for the defendant that in cases of a grant or feoffment a stranger may plead "did not grant, or did not enfeoff," and that plea denies not only the existence but the efficacy of the supposed grant or feoffment. It brings in issue, therefore, the title of the grantor as well as the operation of the deed, and that plea would be a proper plea to bring in issue the execution, construction, and efficacy of any deed of demise. Then the question comes whether the assignee of the lease may be allowed to controvert the title of the lessor when the lessee under whom he derives could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive of all the dicta it would be a very odd thing in the law of any country if A could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on the general principle; for if you look into all the books upon estoppel you find it laid down that parties and privies are estopped, and he who takes an estate under a deed is privy in estate, and therefore never can be in a better situation than he from whom he takes it. I cannot distinguish Parker *v.* Manning, 7 T. R. 537, from this case, though it is the converse. In a late case in this court Williams, Sergeant, by an able argument for a devisee endeavored to convince us that a recovery was void because there was no tenant to the præcipe; but it was answered for the heir that the devisor was tenant on the record and therefore estopped from disputing the recovery, and the devisee consequently was estopped. In the case of Trevivan *v.* Lawrence, 1 Salk. 276 . . . a judgment in scire facias against terre-tenants, which recited the original judgment as of the wrong term, was held to be an estoppel. For these reasons the defendant is as much estopped from pleading this plea as if he had been the original lessee.'

[3] 17 Pick. 14.

contended that the plaintiff was rebutted by the covenants in the deed of Davison; and of this opinion was the court.[1]

No privity exists between creditor and debtor; there is neither devolution nor subordination of rights in the relation.[2] In the case cited Waters conveyed to Spencer all his right, title, and interest in certain land with general warranty, acknowledging receipt of payment, and took judgment for a portion of the purchase-money, which became a lien on the land. Subsequently other creditors obtained judgments against Spencer, which were levied on this land, and the proceeds of sale paid into court. These creditors now sought to take advantage of Waters's deed to Spencer, and to exclude the former from any participation in the distribution. But the court held that there was no estoppel.[3]

[1] 'We do not consider the doctrine of collateral warranty,' said Mr. Justice Putnam in delivering judgment, 'as applicable to the case. If Davison were living and demanding the land, he would be estopped by his deed. So, if his sole heir were suing for it, she would be estopped, being privy both in blood and estate. The warranty of her ancestor has descended upon her, and, as the case finds, with assets of greater value than the land. This is a case of lineal warranty with assets, so far as the daughter, sole heir and wife of the demandant, is concerned. She at the time of her marriage was undoubtedly liable, and her liability devolved upon the husband and wife. If he were to be considered a purchaser, for the valuable consideration of marriage, of all that came to the wife, it was cum onere. He and his wife became and were seised of the real estate in her right; and he took the personal estate absolutely, but subject to all the liability to respond to the warranty of her ancestor. If the demandant were to recover, the tenant would have an action against the demandant and his wife to recover back the value; and the judgment and execution would be against the husband and wife, and might be levied upon the body or estate of the husband.'

On the other hand, 'if a father disseise his son, and levy a fine, this fine will not bind the son as heir and privy, for he does not claim from his father; or if a father be tenant for life, remainder to his son in fee, and levy a fine, this will not bind the son as privy, for his reversion; or if the father levy a fine of the lands of the mother, the son is not bound.' Edwards *v.* Rogers, W. Jones, 460; Doe d. Marchant *v.* Errington, 6 Bing. N. C. 79.

[2] Waters's Appeal, 35 Penn. St. 523.

[3] Woodward, J. said: 'Estoppels may be by deed, but estoppels by deed avail only in favor of parties and privies. Now, the judgment creditors who seek to postpone Waters are not privies of Spencer either in blood, in law, or by estate. Not in blood, for no relationship is alleged; nor in law, for the legal relation between debtor and creditor is one of antagonism rather than of confidence or of mutual dependence; nor by estate, for they have none in the debtor's land. What proves that they have no interest in the land is that a judgment against one of these judgment creditors would not be even a lien on this land. The truth is the relation of

There has been some question among the authorities in regard to the effect of an acceptance of a conveyance of real estate in which there was no relinquishment of the right of dower. It was formerly held in New York, in Maine, and elsewhere that the mere acceptance of such a grant would preclude the grantee from disputing the claim of the grantor's widow to dower.[1]

In several of these cases, as in Wedge *v.* Moore, the grantee set up no other claim to the land than that under the conveyance by the husband of the demandant; and the widow's *title* was therefore made out. These were not properly cases of estoppel. The office of an estoppel is to supply the want of other evidence of a fact. But so far as any of these cases hold that the grantee cannot set up the title of a third person as paramount to that of the demandant's husband, which title the tenant has acquired, they have been overruled.[2]

If, however, the deed be a conveyance in fee simple, and the grantee assert against the widow no paramount title, she will be entitled to dower;[3] not, indeed, because of any estoppel, but because these facts show that she is entitled to it. In such a case the grantee cannot allege, for instance, that the conveyance was made in fraud of the grantor's creditors.[4] That is a matter for them; and until they assert their rights over it, the grantee must yield to the widow's claim. Nor in such cases can the grantee show a defect in the grantor's title.[5] So too the grantee may possibly be estopped in a litigation for dower to deny

judgment creditors to their debtor's real estate is anomalous. They have a lien upon it by virtue of statute law, but they have no interest in it such as makes them privies in estate with the debtor. The covenants, then, express or implied, of Waters's deed cannot operate in favor of Spencer's creditors as an estoppel by deed; and we do not understand any such effect to have been intended by what was said of the deed in Altman *v.* Klingensmith.' 6 Watts, 445.

[1] Bancroft *v.* White, 1 Caines, 185; Bowne *v.* Potter, 17 Wend. 164; Sherwood *v.* Vandenburgh, 2 Hill, 303; Kimball *v.* Kimball, 2 Greenl. 226; Nason *v.* Allen, 6 Greenl. 243; Hains *v.* Gardner, 10 Maine, 383; Gayle *v.* Price, 5 Rich. 525; Dashiel *v.* Collier, 4 J. J. Marsh. 602. See also Hitchcock *v.* Harrington, 6 Johns. 290; Wedge *v.* Moore, 6 Cush. 8; Lewis *v.* Meserve, 61 Maine, 374.

[2] Sparrow *v.* Kingman, 1 Comst. 242; Foster *v.* Dwinel, 49 Maine, 44; Campbell *v.* Knights, 24 Maine, 332; Gammon *v.* Freeman, 31 Maine, 243.

[3] Kimball *v.* Kimball, 2 Greenl. 226; Wedge *v.* Moore, 6 Cush. 8; Gayle *v.* Price, 5 Rich. 525; Dashiel *v.* Collier, 4 J. J. Marsh. 601.

[4] Kimball *v.* Kimball, supra, secus.

[5] Gayle *v.* Price, supra.

the widow's right if there be a specific recital that she is entitled to dower in the land, or that which is tantamount to such a recital, since in respect of her dower interest she is privy in law with the grantor.[1] It should be observed, however, that such a recital is collateral to the purposes of the deed; and if the widow was not a party to it, and perhaps even if she were a party, it is worthy a query if the grantee could not show that the admission was made under a mistake, and that he has subsequently acquired a paramount title.[2]

It does not in modern times constitute a case of privity for the purposes of estoppel to show that one man holds a conveyance of land from another.[3] The modern grantee, unlike a feoffee, acquires the property for himself, and his faith is not pledged to maintain the title of the grantor.[4] A relation of privity is a relation of dependence, not of independence or of superiority.[5] Between the grantor and grantee the recitals of the deed will doubtless be conclusive evidence in a proper case; but the instrument will not for all purposes[6] prevent the grantee from asserting a paramount title which he has acquired from a third person.[7] And this being the case between grantor and

[1] 4 Coke, Litt. 352 a; Campbell v. Knights, 24 Maine, 332 (the recital did not go so far); Wiece v. Marbut, 55 Ga. 613.

[2] Carpenter v. Buller, 8 Mees. & W. 209.

[3] This is strikingly illustrated by Fairchild v. McArthur, 15 Gray, 526, and by Foster v. Wightman, 123 Mass. 100; in which cases it is held that the grantee of a mortgagor, whose mortgage was obtained by the mortgagee through fraud, cannot avail himself of the fraud practised upon his grantor, in a proceeding to enforce the mortgage.

[4] Blight v. Rochester, 7 Wheat. 535; Robertson v. Pickrell, 109 U. S. 608, 615; Cummings v. Powell, 97 Mo. 524, 536; Cooper v. Watson, 73 Ala. 252. The old estoppel (Coke, Litt. 352 a) rested on tenure and dependence.

[5] A claims land under a tax title; B claims the same land under a later tax title. In trespass by A against B, the defendant may show that the plaintiff's title is not good. Wadleigh v. Marathon Bank, 58 Wis. 546.

[6] See post, p. 356.

[7] Blight v. Rochester, 7 Wheat. 535; Robertson v. Pickrell, 109 U. S. 608, 615; Grosholz v. Newman, 21 Wall. 481; Osterhout v. Shoemaker, 3 Hill, 513; Sands v. Davis, 40 Mich. 14; Crumb v. Wright, 97 Mo. 13, 18, 19; Averill v. Wilson, 4 Barb. 180; Watkins v. Holman, 16 Peters, 25, 54; Society for Prop. of Gospel v. Pawlet, 4 Peters, 480, 506; Riddle v. Murphy, 7 Serg. & R. 235; Huntington v. Pritchard, 11 Smedes & M. 327; Gwinn v. Smith, 55 Ga. 145; Kansas Pacific Ry. Co. v. Dunmeyer, 24 Kan. 725; Voorhies v. White, 2 Marsh. 27; Winlock v. Hardy, 4 Litt. 272; Weil v. Uzzell, 92 N. Car. 515; Gaylord v. Respass, ib. 553; Wilcoxon v. Osborn, 77 Mo. 621, 629; Den d. Johnson v. Watts, 1 Jones, 228; Doe d. Worsley

grantee, it follows that the grantee may assert a title which he has acquired paramount to that of such grantor in a contest with one who claims under the same grantor; and it is not broadly true to say, as is sometimes said,[1] that when two persons trace title to the same grantor, each is estopped against the other.[2] But if the grantee assert no other right or title than that from the common grantor, he will be precluded from denying that his grantor had title when he conveyed.[3] This, how-

v. Johnson, 5 Jones, 72; Kerbourgh *v.* Vance, 6 Baxter, 110. Contra, dictum in McClure *v.* Englehardt, 17 Ill. 47 (and some early cases there cited), overruled in Owen *v.* Robbins, 19 Ill. 545. See Campau *v.* Campau, 37 Mich. 245. So, in case the parties trace title to the same instrument alone, and one of them establishes its identity at the trial, the other cannot then dispute its genuineness. Williams *v.* Conger, 125 U. S. 397.

[1] See e. g. Long *v.* Wilkinson, 57 Ala. 259; Wisconsin Central R. Co. *v.* Wisconsin Land Co., 71 Wis. 94, 105; Schwallback *v.* Chicago R. Co., 69 Wis. 292, 299. Also Cooper *v.* Watson, 73 Ala. 252, showing the true rule.

[2] To speak of a person being estopped to deny, against subsequent creditors influenced by his conduct, that he is a stockholder in a corporation by privity (Fisher *v.* Seligman, 75 Mo. 13, 23) is misleading. Supra, p. 343, note 3.

[3] Cummings *v.* Powell, 97 Mo. 524, 536; Brazee *v.* Schofield, 124 U. S. 495, 503; Pendley *v.* Madison, 83 Ala. 484; Bickett *v.* Nash, 101 N. Car. 579, 583; Fisher *v.* Mining Co., 94 N. Car. 397; Curlee *v.* Smith, 91 N. Car. 172; Ives *v.* Sawyer, 4 Dev. & B. 51; Den d. Love *v.* Gates, ib. 363; Den d. Gilliam *v.* Bird, 8 Ired. 280; Kinsman *v.* Loomis, 11 Ohio, 475; Robertson *v.* Pickrell, 109 U. S. 608, 615; Bolling *v.* Teel, 76 Va. 487; Wilcoxon *v.* Osborn, 77 Mo. 621, 629; Brown *v.* Brown, 45 Mo. 412; Keith *v.* Keith, 104 Ill. 397; Woburn *v.* Henshaw, 101 Mass. 193; Grand Tower Mining Co. *v.* Gill, 111 Ill. 541; Riddle *v.* Murphy, 7 Serg. & R. 235; Huntington *v.* Pritchard, 11 Smedes & M. 327; Brock *v.* Young, 5 Ala. 584; Pollard *v.* Cocke, 19 Ala. 188; Long *v.* Wilkinson, 57 Ala. 259; Hasselman *v.* United States Mortg. Co., 97 Ind. 365; Ketchum *v.* Schicketanz, 73 Ind. 137; Bond *v.* Carroll, 71 Wis. 347; Doyle *v.* Wade, 23 Fla. 90, 98. See also Board *v.* Board, L. R. 9 Q. B. 48; Staton *v.* Mullis, 92 N. Car. 623, 628; Armstrong *v.* Wheeler, 52 Conn. 428. The authorities merely declare that a plaintiff's case is made out prima facie when it appears that the defendant claims under the same common grantor; and the question is one of the state of proof only. They distinctly show that the defendant may overturn the plaintiff's case by showing a paramount title under which he (the defendant) claims against that of the common grantor. A questionable distinction taken in California may in this connection be noticed. While it is there agreed that no estoppel arises from the sole fact of a common title under which both plaintiff and defendant claim, it is held that for the purpose of enabling an ousted co-tenant to obtain possession there is an estoppel upon his associate to set up an outstanding title. But after the co-tenant has thus regained possession, either may proceed against the other under a paramount title. Olney *v.* Sawyer, 54 Cal. 379; Bornheimer *v.* Baldwin, 42 Cal. 27. This distinction appears to have been fixed upon to save the case of Lawrence *v.* Webster, 44 Cal. 385, which had justly denied the existence of any estoppel.

ever, though sometimes called a case of privity, rests on another ground. If A can show by his deed that certain rights in lands claimed by C had before been granted to him (A) by B, under whom alone C claims, C must yield to A. This is not because C is in privity with B, but because A shows the better right. It is much the same thing to say that one who enters and holds under the title alone of his grantor will be estopped to deny the efficacy of the title conveyed when sued in ejectment for breach of a valid condition in the deed.[1] Nor is it a case of privity where a second mortgagee of land with notice of an earlier mortgage is postponed to that mortgage unless he can show that it was fraudulent, though such has sometimes been spoken of as a case of privity.[2] If the second mortgagee get nothing, it is simply because the claim of the first has exhausted the estate.[3]

Privity in this as in other branches of the law of estoppel, it should be observed, has a narrower signification than privity in contract. In the law of estoppel privity signifies (1) merely *succession* of rights, that is, the devolution, in whole or in part, of the rights and duties of one person upon another, as in the case of the succession of an assignee in bankruptcy to the estate of the bankrupt on the one hand, and to the rights of the creditors on the other,[4] or (2) the derivation of rights by one person from and *holding* in subordination to those of another, as in the case of a tenant.[5] No one can be bound by or take advantage of the

[1] Cowell *v.* Springs Co., 100 U. S. 55, citing Gill *v.* Fauntleroy, 8 B. Mon. 185; Miller *v.* Shacklefor, 4 Dana, 287, 288; Fitch *v.* Baldwin, 17 Johns. 161. We shall have occasion to recur to this subject in other connections hereafter.

[2] Cook *v.* Parham, 63 Ala. 456. In that case the first mortgagee had fortified his claim by judgment for the debt, but that made no difference; there was no privity. The recitals or covenants of the earlier mortgage could not fall upon the later mortgagee as they would fall upon an heir.

[3] So a purchaser from a mortgagor is not in privity with the mortgagor so as to be precluded from contesting the mortgage. Scates *v.* King, 110 Ill. 456. And a second assignee of property is not in privity with the first, so as to be bound by an estoppel existing against the first. Weyh *v.* Boylan, 85 N. Y. 394.

[4] This case embraces both the privies in blood and the privies in law of Coke. See Coke, Litt. 352 a, 352 b. Privity in estate as applied to the law of estoppel is well explained in 20 Am. Law Rev. 407 et seq.

[5] The well-known definition of Greenleaf may come to the same thing. 'Privity,' he says, 'denotes *mutual* or successive relationship to the same rights

estoppel of another who does not succeed or hold subordinately to his position.[1]

of property.' Ev. § 535. See Litchfield *v.* Goodnow, 123 U. S. 549. Perhaps 'mutual' here is intended to signify 'subordinate;' if not, the definition in this particular must be understood to refer to the wider or different notion of 'privity of contract.'

[1] Shay *v.* McNamara, 54 Cal. 159; Campbell *v.* Hall, 16 N. Y. 575; Doe *v.* Derby, 1 Ad. & E. 783. Marrying the widow of a mortgagor, the widow being in possession, creates no estoppel, such as bound the mortgagor, to dispute the validity of the mortgage. Gorton *v.* Roach, 46 Mich. 294. On the other hand, tenant in dower and tenant by the curtesy are privies in law with the decedent, and so far as they hold in that title are bound by the estoppels that bound the decedent. Coke, Litt. 352 b; Doe *v.* Skirrow, 2 Nev. & P. 123.

CHAPTER IX.

PRELIMINARY VIEW: LIMITATIONS OF THE DOCTRINE.

HAVING now considered the first division of our subject and determined the question to whom estoppels by deed apply, and the general force of the rule upon the subject, we come to the second and more extensive division, in which we purpose to show to what the definition and rule given in the opening of the subject apply. And first, of the limitations of the same.

§ 1. *The Deed must be valid.*

It is essential to the estoppel by deed that the deed itself (which of course must be delivered [1]) should be a valid instrument; a void instrument, though under seal, does not work an estoppel at law or in equity.[2] For example, if officers of a corporation make a mortgage for it which the corporation itself has no power to make, the corporation may deny all authority to execute the deed.[3] In the first case cited the trustees of a turnpike,

[1] Nourse *v.* Nourse, 116 Mass. 101.

[2] Moses *v.* McClain, 82 Ala. 370; McIntosh *v.* Parker, ib. 238; Shorman *v.* Eakin, 47 Ark. 351, 354 (contracts contrary to public policy, in regard to which see also Klenk *v.* Knobel, 37 Ark. 307; Webb *v.* Davis, ib. 555); Caffrey *v.* Dudgeon, 38 Ind. 512; Merriam *v.* Boston R. Co., 117 Mass. 247; Conant *v.* Newton, 126 Mass. 105; Pells *v.* Webquish, 129 Mass. 469; Mason *v.* Mason, 140 Mass. 63 (that a *conveyance* by a wife — though sui juris — in the lifetime of her husband of her dower interest is void, and creates no estoppel against her after her husband's death); James *v.* Wilder, 25 Minn. 305; Sherlen *v.* Whelen, 41 Wis. 88. See Flersheim *v.* Cary, 39 Kans. 178. But see Wilson *v.* Western Land Co., 77 N. Car. 445, holding that a deed executed in violation of an injunction may still estop the grantor.

[3] Fairtitle *v.* Gilbert, 2 T. R. 169; In re Companies Acts, 21 Q. B. D. 301. Chitty, J.: 'It is well established that a corporate body cannot be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done.' See post, chapter 16. So a principal may deny the power of an agent of limited authority to make a particular representation, in ordinary cases. Cox *v.* Bruce, 18 Q. B. D. 147, C. A.; Barnett *v.* South London Tramways Co., ib. 815, C. A.

having authority to erect toll-houses and to mortgage the tolls, but having no power, as the court held, to mortgage the toll-houses or gates, in order to raise funds executed to the lessors of the plaintiff mortgages of the tolls, and *also* of the toll-houses and toll-gates. The mortgagees now brought an action of ejectment to recover possession of the toll-houses and gates. The trustees objected that the act did not warrant them in mortgaging this property, and judgment of nonsuit was given in the court below against the plaintiff. On a motion to set aside the nonsuit it was contended that as some of the defendants had joined in executing the conveyance, they were estopped from taking that objection; but the court ruled otherwise. Mr. Justice Ashhurst, in delivering judgment, said that in general the party granting is estopped by his deed to say he had no interest; but that general principle did not apply to this case, where the trustees were not acting for their own benefit, but for the benefit of the public. It would be hard that other creditors who were not parties to the deed should lose the benefit which the act had given them. Besides, there was a still further reason why the trustees should not be estopped; this was a public act of Parliament, and the court were bound to take notice that the trustees under this act had no power to mortgage the toll-houses. This deed, therefore, could not operate in direct opposition to an act of Parliament, which negatived the estoppel.[1]

This last position taken by the learned judge has been qualified and explained in a later case.[2] The case cited was an ejectment by a mortgagee of tolls of a certain bridge. The plaintiff was not the first mortgagee, and was not empowered to recover as a trustee for all. But the ordinary principle was relied on, that a grantor cannot dispute against his grantee his own title to what he has assumed to convey. The application of the principle was, however, denied on account of the public character of the defendant; counsel relying on the above-cited dictum of Mr. Justice Ashhurst. Lord Denman, after quoting the statement, said that that observation proceeded on the presumption that the contents of the act were known to both the contracting

[1] See Doe d. Baggaley v. Hares, 4 Barn. & Ad. 433.

[2] Doe d. Levy v. Horne, 3 Q. B. 757, 766.

parties, and qualified any contract into which they might enter in execution of its powers. No such presumption could be made concerning any party's knowledge of the *fact* that a previous mortgage had been made; and there was no authority for holding that trustees for a public purpose were in any particular state of protection on such a point.[1] Estoppels of this kind will be resumed in the chapter on Corporations.

In like manner, if a deed has been executed in contravention of statute, the law of estoppel does not apply.[2] In the case first cited an ejectment was brought for certain lands charged with an annuity, by the grantee against the grantor. No registration of the deed had been made, and the plaintiff contended that none was necessary under the statute by reason of the fact that the defendant had covenanted that the premises were of more than sufficient value to pay the annuity. The defendant offered to prove the contrary, and thus to show that the deed should have been registered. The plaintiff contended that he was estopped by the deed; but the court ruled otherwise.[3]

[1] It would seem from the concluding remark of the Chief Justice that he altogether doubted the soundness of the dictum. He said: 'The dictum of Ashhurst, J. is not adopted by either of the two judges sitting with him, whose concurrence in the general result might be wholly independent of this doctrine.' But the other judges did not express any dissent from the doctrine.

[2] Doe d. Chandler *v.* Ford, 3 Ad. & E. 649; Doe d. Preece *v.* Howells, 2 Barn. & Ad. 744; Merriam *v.* Boston R. Co., 117 Mass. 241.

[3] Mr. Justice Patteson said: 'I do not say whether in a different case this covenant would have been an estoppel or not. But the question here arises on a statute which says that an annuity deed, if no memorial is enrolled, shall be void unless it falls under certain provisions contained in the tenth section. To enforce the deed where there is no memorial, the parties must show that it comes within one of these provisions; in the present case, that the lands are of equal annual value with the annuity, or greater. To establish that here, the defendant refers to a covenant by which, as he says, it is stated that the lands are of such value. But that is not sufficient for the purpose. If it were held so, an instrument which the parties might choose to prepare would defeat the statute from beginning to end. They insert a covenant that the land is of the requisite value; they might equally well put in a statement that the annuity was given by marriage settlement, or without regard to pecuniary consideration, and then contend that the grantor was estopped.' See also to the proposition that there is no estoppel if the deed be void, Doe d. Stevens *v.* Hays, 1 Ind. 247; Housatonic Bank *v.* Martin, 1 Met. 294, 307; Germond *v.* People, 1 Hill, 343; Jackson *v.* Brinckerhoff, 3 Johns. Cas. 101 (conveyance of land in adverse possession. But see Stockton *v.* Williams, 1 Doug. (Mich.) 546, holding that such deed works an estoppel).

If, however, the deed is void only against one of two grantors and not against the other, as in the case of a deed of the wife's land by husband and wife with defective privy examination, the deed will be effectual as an estoppel on the grantor towards whom it was valid, though not in regard to the other.[1] In like manner, a deed executed by an agent in excess of his authority in which the covenants embrace him as well as his principal will in respect of such covenants bind the agent by estoppel.[2] Indeed, the rule under consideration has no relation to conveyances of land by a grantor before he has acquired a title; a subject to be considered later. If a deed be void in part only, and the rest be severable, estoppels may arise from the part which is good.[3] Of course a deed procured by fraud works no estoppel.[4]

The effect of the estoppel further is

§ 2. *Limited to Questions directly concerning the Deed.*

The purpose for which a statement in the deed was made must always be considered, and its effect limited accordingly, however broad its language. Recitals are generally made for the purpose of indicating or of carrying into effect the general object of the deed, and not for collateral purposes;[5] and hence the rule is that a recital is conclusive of the facts stated, only in an action of which the deed itself is the foundation or defence.[6]

That this limitation prevails, preventing the estoppel from having a collateral effect, appears from many cases;[7] and its effect appears to be to put the estoppel on grounds of contract, a point already referred to.[8] In Carpenter *v.* Buller the plaintiff

[1] Wellborn *v.* Finley, 7 Jones, 228; Chapman *v.* Abrahams, 61 Ala. 108. See Albany Ins. Co. *v.* Bay, 4 Comst. 9.

[2] North *v.* Henneberry, 44 Wis. 306.

[3] United States *v.* Hodson, 10 Wall. 395; Daniels *v.* Tearney, 102 U. S. 415, 420.

[4] Hazard *v.* Irwin, 18 Pick. 95; Partridge *v.* Messer, 14 Gray, 180.

[5] See Weed Sewing Machine Co. *v.* Emerson, 115 Mass. 554.

[6] Linney *v.* Wood, 66 Texas, 22, 28. And of course the estoppel is confined to the subject-matter of the conveyance. Fisher *v.* Mining Co., 97 N. Car. 95; s. c. 94 N. Car. 397.

[7] Carpenter *v.* Buller, 8 Mees. & W. 209; Fraser *v.* Pendlebury, 31 L. J. C. P. 1; s. c. 10 Weekly R. 104; Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520; Carter *v.* Carter, 3 Kay & J. 617, 645; Young *v.* Raincock, 7 C. B. 310; Stroughill *v.* Buck, 14 Q. B. 781; Bank of America *v.* Banks, 101 U. S. 240, 247.

[8] Ante, p. 331, note.

sued for a trespass alleged to have been committed on his close. The defendant pleaded title in himself, and introduced in evidence a deed made between the parties for a purpose collateral to the question of title, in which it was recited that the title to the property was in himself. Counsel for the plaintiff contended that the recital, though admissible in evidence, was not conclusive; and he proposed to show that the admission was made under a misapprehension. On the other hand, it was contended that the plaintiff was estopped by his admission in the recital, and that the evidence was therefore inadmissible. But the court ruled that the evidence was proper.[1]

The same principle prevailed in the case of Norris *v.* Norton.[2] This was an action of trespass de bonis asportatis in which it appeared that under an execution against a third person the plaintiff's property was levied on. The plaintiff claimed it, and proposed to try the right of property, but subsequently executed to the sheriff a delivery bond with the understanding that he should not be precluded thereby from asserting his title. The property was delivered and sold under protest by virtue of the execution, whereupon the plaintiff brought this action against the purchasers. The defendants now contended that the plaintiff was estopped by the recitals in the bond from maintaining the action. But the court ruled otherwise, declaring that the estoppel could not arise in a proceeding not founded upon the delivery bond or in vindication of any right based upon or growing out of it.[3]

[1] In delivering judgment, Parke, B. said: 'All the instances given in Comyns's Digest, Estoppel (A. 2), under the head of "Estoppel by Matter of Writing," except one which relates to a release, are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped in an action by the other party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence.' So in Fraser *v.* Pendlebury, 31 L. J. C. P. 1, Williams, J. said: 'It is clear from Carpenter *v.* Buller that these estoppels are only in form where the matter of the deed itself is in dispute, and not where the dispute is about matters entirely collateral to it.'

[2] 1 Ark. 319.

[3] 'No plausible reason has been offered,' said Mr. Justice Scott in delivering judgment, 'to sustain the idea that the appellee ought to be estopped by the recitals in the delivery bond under the circumstances of this case, and we can conceive of none; and certainly none of the authorities cited to the

When, however, the proceeding, though not upon the deed, grows out of it, it is not, as the court intimate in the case just referred to, collateral to the deed. The point is illustrated by Wiles *v.* Woodward.[1] The case was trover for a quantity of paper, to which the defendant pleaded not guilty and not possessed. It appeared that the plaintiff and the defendant had been in partnership together as paper-makers and iron-merchants, and that the partnership had been dissolved by deed, in which it was recited that an agreement had been made that the defendant should have all the stock in trade of the business in paper, but that the plaintiff should receive paper of a certain value out of the stock, to remain in the paper-mill for a year. On the other hand, the plaintiff was to have all the stock in trade in the iron branch of the business. The deed then recited that in pursuance of that arrangement paper of that value had been actually delivered to the plaintiff, and that it was then in the paper-mill. An assignment followed in the deed by the defendant to the plaintiff of all the stock in trade in the iron branch of the business, and by the plaintiff to the defendant of all the stock in the paper branch except that delivered to the plaintiff; and the partnership was dissolved. It appeared in fact that no paper had been delivered to the plaintiff; and it was contended that the plaintiff could not maintain an action of trover, as no certain definite quantity of paper belonged to him; that as all the paper was assigned to the defendant except that delivered to the plaintiff, the whole was the defendant's; and if not that it was still the joint property of both, and therefore no action of trover could be maintained by the plaintiff, being one joint tenant, against the defendant, who was another. The reply was that both parties were estopped by the deed to say that no

point come up to the facts of this case. If this proceeding was upon the delivery bond, or was to vindicate or defend some right predicated upon or growing out of it, then most of them would be in support of the objection urged. But this is not the case here. The condition of the defendants has been in no way superinduced or in any way affected by the matter that they seek to set up as an estoppel against the appellee. The very instrument itself in which the matter was contained has performed its office, and in legal contemplation does not exist at all unless as the root of something that has grown up from it.' See Syme *v.* Montague, 4 Hen. & M. 180; Jemison *v.* Cozens, 3 Ala. 636.

[1] 5 Ex. 557.

such delivery had taken place; and this too not merely in an action on the deed, but in the present proceeding to enforce the rights arising out of it, a proceeding which, it was urged, was not collateral to the deed. And of this opinion was the court.

It is held, however, that a party to a joint deed cannot limit the effect of his deed by alleging that it only covers land held jointly by the grantors, and does not embrace land owned in severalty within the general limits mentioned in the deed.[1] The precise question in the case cited was whether, under a joint license by deed to make a canal through the land of the licensors, the licensees could be restricted to land held jointly by the parties, and whether one of the parties was barred from maintaining an action in respect of an injury to land owned in severalty. The license was in these words: 'We, the said Israel, Ebenezer, and David, do hereby give to said corporation full and entire permission, authority, and power to make, finish, and complete said crossdam, road, dike, and canals, and to keep up and maintain said dam, road, and dike, and to keep open and maintain said canals forever.' The court held that the action could not be maintained. The deed, it was said, did not describe the grantors as tenants in common. The license made no reference to any particular land, but authorized the works generally. This necessarily precluded each party to the deed from claiming any damages consequent upon the act which they had authorized; and it was to be taken to be their several as well as joint license. It would be absurd that a man who had joined with others in allowing an act to be done which might injure his own land as well as that which he owned in common should be allowed to say, 'It is true I permitted you to do the act, but I did not intend you should do injury by the act to my land, but only to that which I owned with others.'[2]

[1] Francis *v.* Boston & R. Mill Corp., 4 Pick. 365.

[2] 'Suppose the case,' the court observed, 'of three men owning a mill privilege in common, and one of them owning another privilege below on the same stream, and the three joined in a license or grant to stop the water above the first privilege, or to divert it so as to destroy both the privileges; can the one of the three who had joined in the deed complain because the privilege which he held in severalty is destroyed? Certainly not. The grant in such cases must be taken distributively, so that each grantor should be estopped from claiming any damages occasioned by the act which he had permitted.'

§ 3. *Grantee in Deed-Poll: In Indenture: Mutuality.*

In case the instrument be a deed-poll, that is, the deed of the grantor only, the doctrine that the parties to a sealed instrument cannot dispute its force and effect is subject to the further qualification that the estoppel applies in general only to the grantor, and does not reach the grantee.[1] The acceptance of a deed-poll, however, sometimes works an estoppel upon the grantee in the case of admissions and covenants intended for him.[2] Nor does this qualification to the rule extend at the present day to leases by deed-poll, as we shall see in Part III. A tenant is now estopped to deny his landlord's title in such cases as perfectly as in leases by indenture; though it was otherwise in the time of Coke.[3]

A more important limitation of the rule concerning estoppels by deed is now to be presented and illustrated. No statement in the books is more common than the rule of Sir Edward Coke, that one who accepts an estate from another is estopped to deny the latter's title;[4] and the contrary statement occurs almost as frequently. Leaving out of the question the relation (to which the rule properly applies) of subordinate tenure, such as that of landlord and tenant, and all similar relations, including cases of covenants or stipulations from a grantee to restore or surrender

[1] Cooper *v.* Watson, 73 Ala. 252; Gardner *v.* Greene, 5 R. I. 104; Sparrow *v.* Kingman, 1 Comst. 242; Great Falls Co. *v.* Worster, 15 N. H. 414, 450; Winlock *v.* Hardy, 4 Litt. 272. In Winlock *v.* Hardy, just cited, Boyle, C. J. speaking for the court in regard to a deed of this kind, said: 'It is not the deed of the defendant, but of Isham only, by whom alone it is executed; and not being the deed of the defendant it cannot as a deed operate to estop him from denying that the grantor had title. Nor can the deed create any relation between the parties to it whereby the defendant would be estopped. We know that a tenant cannot deny the title of his landlord, nor can a person who enters upon land in virtue of an executory contract of purchase deny the right of him under whom he enters, for he is quasi a tenant holding in virtue of his vendor's title and by his permission. But the deed in question is an executed grant to the defendant in fee simple, and he holds, not as tenant of the grantor, but in his own right and for his own benefit, and his possession is adverse to his grantor, as well as to the rest of the world. He cannot, therefore, be under any greater obligation not to dispute his grantor's title than he is not to dispute the title of any other person.'

[2] Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; infra, p. 357.

[3] Coke, Litt. 47 b. See Part III.

[4] Coke, Litt. 352 a.

possession on the termination of a life estate, and recitals declaring a reversion to be in a grantor,[1] we proceed to inquire of the true doctrine respecting the power of a grantee holding free from all claims of the grantor to deny the title of the latter.[2]

It is certain that a grantee cannot, while holding possession under his grantor, dispute his grantor's title for the purpose of escaping entirely the payment of the purchase price of the property.[3] It is a well-established rule of equity that if a purchaser buys in a better title than that of his vendor, the latter being guilty of no fraud, he (the vendor) can be compelled to refund to the buyer only the sum paid for the better title.[4] Nor can a grantee question the validity of his grantor's title at the time of his conveyance in a contest with another who claims under the same grantor, unless he claims under a paramount title which he has himself acquired or connected himself with. He cannot assert the existence of such paramount title, or allege any defect in his grantor's title, nor can he say that the conveyance which he has accepted was made in fraud of his grantor's creditors, so long as he claims under that title alone.[5] Nor will a person be permitted to accept a deed with covenants of seisin and then turn round upon his grantor and allege that his covenants are broken by reason of the fact that he himself at the time he accepted the deed was seised of the premises.[6] Nor will the grantee in a deed-poll, having accepted the deed and estate, be permitted to deny his covenants, or that the seal attached is his, in an action on the covenants.[7]

[1] Robertson *v.* Pickrell, 109 U. S. 608, 615; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35. These relations are treated of in Part III.

[2] See ante, pp. 345–347.

[3] Robertson *v.* Pickrell, 109 U. S. 608, 615; Peters *v.* Bowman, 98 U. S. 56; McConihe *v.* Fales, 107 N. Y. 404, 408; York *v.* Allen, 30 N. Y. 104; Abbott *v.* Allen, 2 Johns. Ch. 520; Crumb *v.* Wright, 97 Mo. 13, 19; Munford *v.* Pearce, 70 Ala. 452; Small *v.* Reeves, 14 Ind. 163; Marsh *v.* Thompson, 102 Ind. 272, 275; Sebrell *v.* Hughes, 72 Ind. 186.

[4] Bush *v.* Marshall, 6 How. 284; Seavey *v.* Kirkpatrick, Cooke, 211; Mitchel *v.* Barry, 4 Hayw. 136.

[5] Ante, p. 345; Ives *v.* Sawyer, 4 Dev. & B. 51; Den d. Worsley *v.* Johnson, 5 Jones, 72; Ray *v.* Gardner, 82 N. Car. 146; Caldwell *v.* Neely, 81 N. Car. 114; Ketchum *v.* Schicketanz, 73 Ind. 137; Rochell *v.* Benson, Meigs, 3; Wilkins *v.* May, 3 Head, 173; Woburn *v.* Henshaw, 101 Mass. 193.

[6] Fitch *v.* Baldwin, 17 Johns. 161, 166; Beebe *v.* Swartwout, 3 Gilman, 162, 179; Furness *v.* Williams, 11 Ill. 229.

[7] Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35. But though the grantee's

With these exceptions a grantee is not estopped to deny the title of his grantor.[1] Thus, a grantee of land conveyed by an

deed is made in terms subject to all liens of mortgages, the grantee is not estopped to deny the validity of a mortgage. Purdy *v.* Coar, 109 N. Y. 448.

[1] Cummings *v.* Powell, 97 Mo. 524, 536; Mattison *v.* Aussmuss, 50 Mo. 551; Grosholz *v.* Newman, 21 Wall. 481; Merryman *v.* Bourne, 9 Wall. 592, 600; Blight *v.* Rochester, 7 Wheat. 535; Osterhout *v.* Shoemaker, 3 Hill, 513; Averill *v.* Wilson, 4 Barb. 180; Collins *v.* Bartlett, 45 Cal. 371; Donahue *v.* Klassner, 22 Mich. 252; Sands *v.* Davis, 40 Mich. 14. See Campau *v.* Campau, 37 Mich. 245. The subject was considered by the Supreme Court of New York in Averill *v.* Wilson, 4 Barb. 180. 'It is very evident,' said Mr. Justice Paige for the court, 'that no relation of landlord and tenant, not even in a qualified form, exists between a grantor and grantee. If the vendor has actually executed a conveyance, his title is extinguished in law as well as in equity. The vendee acquires the property for himself; and he is under no obligation to maintain the title of the vendor. He holds adversely to his grantor, and may treat him as a stranger to the title. The property having become the property of the vendee by the sale, he has a right to fortify his title by the purchase of any outstanding title which may protect him in the quiet enjoyment of the premises. (*a*) Chief Justice Marshall, in Blight's Lessee *v.* Rochester, 7 Wheat. 535, says that "no principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it." In Osterhout *v.* Shoemaker, 3 Hill, 513, Bronson, J. says: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor; and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation express or implied that he will at some time or in some event surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract express or implied that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." [See also Watkins *v.* Holman, 16 Peters, 25, 54; Society for Propagation of Gospel *v.* Pawlet, 4 Peters, 480, 506; Voorhies *v.* White, 2 Marsh. 27; Winlock *v.* Hardy, 4 Litt. 272; ante, p. 357.] . . . Where a grantor who has no title conveys with warranty, any estate subsequently acquired by him will inure to the benefit of the grantee upon the principle of avoiding circuity of action. The grantor cannot be said technically to be estopped by his deed from averring he had no title when he conveyed; but the warranty interposes and rebuts and bars him and his heirs of a future right which was not in him at the time of the conveyance. . . . The grantor with warranty is not estopped by any recitals or allegations in his deeds, upon the strict principles of a technical estoppel, from asserting his title subsequently acquired. But it is his warranty which rebuts and bars him of this newly acquired title and passes it to his grantee, or causes it to inure to his benefit. In fact, in the usual form of a covenant of warranty there is no precise and direct assertion of a present title in the grantor nor a representation that he is the owner which could operate upon the grantee as an inducement to purchase and part with his money. But the grantee takes the warranty, and relies

(*a*) This had been done in the present case.

intestate with intent to defraud creditors is not estopped by taking under the deed and acting upon it to object, as one of the creditors of the estate, that the deed was fraudulent.[1] And a grantee of land conveyed with warranty, who reconveys in mortgage with warranty to secure the purchase-money may show an outstanding title and an eviction thereunder. It has been so held by the Supreme Courts of Connecticut, Massachusetts, and other states in actions by the grantee and mortgagor against the grantor and mortgagee on the latter's covenants of seisin and against encumbrances.[2] The defendant cannot plead

upon that as his indemnity against any defects in the title. . . . In this view of the effect and operation of a deed with warranty upon the rights of the grantor there is nothing inconsistent in the principle that a grantee in a warranty deed is not estopped from controverting the title of his grantor. If as is shown by the cases before cited no relation of landlord and tenant exists between a vendor and a vendee after a conveyance from the former to the latter; if the title of the vendee, although derived from, is adverse to the vendor; if the vendee owes no faith or allegiance to the vendor; if by the sale the title of the vendor is extinguished, and the property becomes the property of the vendee, and he takes the land to hold for himself and to dispose of it at his pleasure, — the vendee does the vendor no wrong by treating him as a stranger to the title, by either controverting his title, or by buying in an outstanding title, although the conveyance from the vendor to the vendee may have been with warranty.'

[1] Norton *v.* Norton, 5 Cush. 524; Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316, 327.

[2] Hubbard *v.* Norton, 10 Conn. 422; Sumner *v.* Barnard, 12 Met. 459; Randall *v.* Lower, 98 Ind. 255, 259; Connor *v.* Eddy, 25 Mo. 72; Lot *v.* Thomas, 2 N. J. 407; Haynes *v.* Stevens, 11 N. H. 28; Hardy *v.* Nelson, 27 Maine, 525; Brown *v.* Staples, 28 Maine, 497. See Gilman *v.* Haven, 11 Cush. 330. This is not estoppel against estoppel, however; the grantee and mortgagor might set up against the vendor an after-acquired title. Randall *v.* Lower, supra; ante, p. 345. 'And it is now claimed,' said Williams, C. J. speaking for the court in Hubbard *v.* Norton, 'that the last covenants preclude or estop the plaintiff from a right of action on the others, because, it is said, they are simultaneous. Unless all principles of common sense are discarded, we must suppose that the deed of the defendants conveying the land in fact preceded that of the plaintiff, which was given to secure the consideration money for the land so conveyed. There must, then, have been a seisin in the plaintiff under and by virtue of the defendant's deed to him. . . . If, then, we must consider the plaintiff's deed as subsequent to that of the defendants, it can be no estoppel, because a warranty of title by the plaintiff in a subsequent deed will not prove that the defendants had title when they conveyed to the plaintiff; for the plaintiff might at that time or immediately after have purchased in another title, or removed the encumbrance. The contrary is not so clearly implied as to become one of those presumptions of law which cannot be rebutted. To create that legal certainty requisite to constitute an estoppel the defendants must show that the plaintiff could have no other title than that acquired by deed of the defendants. It may be improbable, but surely is not

in bar or rebutter of the action the plaintiff's covenant in the mortgage deed.

In like manner, it is held that a recital of a prior conveyance in a deed under which a party holds will not estop him from claiming under a paramount title;[1] and on the other hand, that one who accepts a conveyance reciting a prior lease or mortgage cannot impeach the title of the lessor or mortgagor on any ground that would have been open to his grantor, unless he can show that he has acquired a better title.[2]

§ 4. *Estoppel against Estoppel*

commonly sets the matter at large;[3] which is another limitation of the doctrine under consideration. And such a case occurs where the deed is encountered by another instrument of

impossible. The fact that the plaintiff had a title when he reconveyed it to the defendants is consistent with the fact that the defendants had not a perfect title when they conveyed to the plaintiff. Again, it is said, these facts form a good defence because the law abhors a circuity of action; and if the plaintiff can recover of the defendants, they can also recover of the plaintiff. This objection presupposes what is not admitted, that the plaintiff had not procured a title when his deed was given or since that time. If the plaintiff had proved such a deed when he gave his, then the defendants could not recover anything upon their covenants in the mortgage deed. If they have since gained such title and removed such encumbrance, then only nominal damages can be recovered; and unless the court can see that the same damages must be recovered by the one party as by the other, the suit will not be barred for fear it will produce another.'

[1] Baldwin *v.* Thompson, 15 Iowa, 504; Jackson *v.* Carver, 4 Peters, 1, 83; Crane *v.* Morris, 6 Peters, 598, 611.

[2] Addison *v.* Crow, 5 Dana, 271; Coakley *v.* Perry, 3 Ohio St. 344; Ward *v.* McIntosh, 12 Ohio St. 233. 'And this would seem to be all that is meant by the broad declaration . . . that a man who accepts or acts under a deed cannot dispute the facts which it recites.' 2 Smith's L. C. 712, 6th Am. ed., citing Chautauque Co. Bank *v.* Risley, 4 Denio, 480; Denn *v.* Cornell, 3 Johns. Cas. 174; Springstein *v.* Schermerhorn, 12 Johns. 357; Funk *v.* Newcomer, 10 Md. 301, 316; Ward *v.* McIntosh, 12 Ohio St. 231. See also upon this subject Chiles *v.* Boothe, 3 Dana, 567; Cutter *v.* Waddingham, 33 Mo. 269; Lorain *v.* Hall, 33 Penn. St. 270; Walthall *v.* Rives, 34 Ala. 91; Woburn *v.* Henshaw, 101 Mass. 193, holding that one in possession of a mill, located on a canal, and claiming title by a deed made by order of court binding him to keep the canal in repair, cannot escape from this liability on the ground that the order of court was defective, and that no title was passed by the deed.

[3] Coke, Litt. 352 b; 12 Hen. 7, p. 4; 6 Hen. 4, p. 7; Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 683; Branson *v.* Wirth, 17 Wall. 32, 42; Tibbets *v.* Shapleigh, 60 N. H. 487, 491; Page *v.* Smith, 13 Oreg. 410, 413. The rule was applied to estoppel in pais in the last case. See ante, p. 332, note 6.

equally high rank, inconsistent with the same, and made between the same parties.[1] 'In this case,' said the court in Brown *v.* Staples, 'Winthrop Allen could maintain no action upon the covenants of the deed made to him by the demandant for a breach occasioned by his being deprived of the land by virtue of the mortgage made by Elliot Staples to John Welles, for he had by an obligation of as high a nature obliged himself to discharge that mortgage, and had thereby annulled the operation for such purpose of those covenants. It has been decided that a covenant of warranty would not include an encumbrance which the grantee had engaged to discharge.'[2] So too the assertion of an estoppel by deed may be prevented by the existence of an estoppel in pais against the use of the deed.[3]

But the fact that there exists between the parties another deed the terms of which are inconsistent with those of the one in suit, if that other deed be collateral to it and not in discharge or modification of it, will not suffice to remove the estoppel and open the matter to evidence.[4] Thus, in Lainson *v.* Tremere, just cited, an action was brought on a bond conditioned for the payment of £170 yearly for the rent of certain premises; and the defendant attempted to show that the rent actually agreed upon was £140, and for this purpose offered in evidence the lease itself of the premises, which so recited the annual rental. But the court held the averment of the bond conclusive. Had the proceeding, however, been brought upon the lease for possession on the ground of non-payment of rent, the terms of the same would have been conclusive of the sum due; and the recital of the bond would not have been admissible to set the matter at large. The estoppel of a deed becomes but prima facie evidence in collateral proceedings.[5]

§ 5. *No Estoppel if Truth appears.*

Another qualification is that if the truth plainly appears on the face of the deed, there is, generally speaking, no estop-

[1] Brown *v.* Staples, 28 Maine, 497. See also Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 693.

[2] Watts *v.* Welman, 2 N. H. 458.

[3] Platt *v.* Squire, 12 Met. 494.

[4] Lainson *v.* Tremere, 1 Ad. & E. 792. See Carpenter *v.* Buller, 8 Mees. & W. 209.

[5] Carpenter *v.* Buller, supra; ante, pp. 352, 353.

pel.[1] And this simply means that all parts of the deed are to be construed together; and that if an allegation in the deed which alone would work an estoppel upon the parties is explained in another part of the deed, or perhaps in another deed to which reference is made *for the purpose*, there is ordinarily no estoppel.[2]

In Montgomery's Case[3] it appeared that King Edward VI., being patron of a church held by an incumbent, by his letters-patent granted the advowson to the Bishop of L and his successors; and further by the said letters-patent granted that after the avoidance of the church by death, resignation, or otherwise, the said bishop and his successors should hold the church to their own use. Afterwards the bishop made a lease of the parsonage for sixty years to commence at such time as the parsonage should come to the hands of the bishop or his successors by the death, resignation, or other act of the incumbent; which lease was confirmed by the dean and chapter. The bishop died; the incumbent then died; and the bishop's successor entered and made a lease for twenty-one years to Montgomery, thus ignoring the previous demise. It was resolved by all the judges that the first lease was void because the lessor had nothing in the parsonage during the life of the incumbent who survived the bishop. And the nature of the bishop's interest appearing on the face of the lease, neither he nor his successor could be estopped by it.[4]

In Pargeter *v.* Harris,[5] an action for breach of covenant in a lease, the declaration stated purposely so much of the lease, said the Lord Chief Justice, as showed that the plaintiffs had only the equity of redemption in the premises, and that the defendant knew that circumstance from the recitals in the lease. The recital was thus of itself sufficient to prevent either party being estopped from denying that the plaintiffs had a legal

[1] Coke, Litt. 352 b; Pargeter *v.* Harris, 7 Q. B. 708; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; s. c. 6 Hurl. & N. 135; Morton *v.* Woods, L. R. 3 Q. B. 658; s. c. 4 Q. B. 293; Wheelock *v.* Henshaw, 19 Pick. 341; Pelletreau *v.* Jackson, 11 Wend. 110, 118; Jackson *v.* Sinclair, 8 Cowen, 543, 586; Hannon *v.* Christopher, 34 N. J. Eq. 459, 465.

[2] Hannon *v.* Christopher, 34 N. J. Eq. 459.

[3] Dyer, 244 a.

[4] See Coke, Litt. 352 b.

[5] 7 Q. B. 708.

reversion; in truth, it estopped them from asserting it. So too it is held that if an *ejectment* be brought upon a lease which shows upon its face that the lessor has no legal reversion, there will be no estoppel on the tenant.[1] The ground of the cases is suggested to be that the covenant must be enforceable as an obligation at law, and ejectment also requires a legal estate in the plaintiff.[2] The lease negatives the existence of this in the lessor.[3] In the case of an action to try the validity of a distress, where this technical ground does not exist, the estoppel upon the tenant is not obviated by the lease showing the want of a legal title in the lessor.[4] For the recovery of rent in such cases it would seem necessary to sue for use and occupation instead of in covenant (if that *does* require a legal estate), or to file a bill in equity.[5] The distinction if real is a nice one; and cases like Pargeter *v.* Harris and Saunders *v.* Merryweather now stand on narrow ground.[6] If, however, the fact that the lessor's estate is only equitable does not appear in the lease but in another deed, as in an assignment of the lessor's interest, the fact cannot in any case be taken advantage of by the lessee, even in an action of covenant by the assignee.[7]

[1] Saunders *v.* Merryweather, 3 Hurl. & C. 902.

[2] Morton *v.* Woods, L. R. 4 Q. B. 293, 303, in Ex. Ch.

[3] Of course if the deed did not show the want of a reversion, the lessee would be estopped to allege the fact as well in ejectment as in an action for rent or for trying the validity of a distress.

[4] Morton *v.* Woods, supra; Jolly *v.* Arbuthnot, 4 De G. & J. 224; Tilyou *v.* Reynolds, 108 N. Y. 558, 563.

[5] Jolly *v.* Arbuthnot, 4 De G. & J. 224; s. c. 28 L. J. Ch. 547; Morton *v.* Woods, supra.

[6] 'But even if any of the decisions or dicta were to lead to the conclusion that when the truth appears [in such cases] there can be no estoppel, that doctrine must be taken to be overruled by the case of Jolly *v.* Arbuthnot.' Kelly, C. B. in Morton *v.* Woods. See also Hannon *v.* Christopher, 34 N. J. Eq. 459, 466. It is there said that 'whether the appearance of the truth on the face of the instrument will defeat an estoppel or not must altogether depend upon the fact whether it is so expressed that it can be readily seen and understood by the person who ought to be influenced by it, or in manner so technical or obscure that although it must be admitted it appears in the instrument, yet it is certain it was not seen or understood by the person who should have been influenced by it, but that he dealt with the party sought to be estopped as though the words on which the estoppel is founded expressed the whole truth.'

[7] Gouldsworth *v.* Knights, 11 Mees. & W. 337, 343, explaining Whitton *v.* Peacock, 2 Scott, 630; s. c. 2 Bing. N. C. 411; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; s. c. in error, 6 Hurl. & N. 135. In delivering judgment in the Exchequer Chamber in the last-named case, Wightman, J. said: 'The

lessor in this case, being a mortgagor in possession at the time of the granting of the lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee is only by estoppel, and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case if the plaintiff had declared in the old form, he would have stated the lessor to have been seised in fee, which according to the cases might have been traversed; and if it had and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is how ought the issue upon the traverse to be found? The answer is for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a *legal* estate as would warrant the lease; and as no other legal estate or interest is shown to have been in the lessor it must be taken as against the lessee by estoppel that the lessor had an estate in fee.'

CHAPTER X.

RECITALS.

A RECITAL in a sealed instrument is defined to be the preliminary statement of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the transaction is founded.[1] A formal recital is generally contained in the premises of the deed, and usually begins with the word 'whereas,' which, when there are several recitals in connection, is repeated accordingly, — 'and whereas.'[2] However, we shall see that recitals are also introduced in other ways, and that the term is extended to other parts of the deed than the preliminary statement of the inducement and purpose; indeed, that the term, or at least the rule applicable to the term, is applied to all distinct, material statements of fact within the instrument.

There are two kinds of recital, particular and general. The former are conclusive evidence of the matters stated, if the deed is valid,[3] in actions concerning the direct purpose of the deed.[4] If the deed is collateral to the purposes of the action, the recital, however specific, is but prima facie evidence, as we have seen;[5]

[1] 2 Black. Com. 298.

[2] Burrill, Law Dict. 'Recital.'

[3] Not if it is void. Conant *v.* Newton, 126 Mass. 105. Recital cannot estop one to allege non est factum. Manuf. Co. *v.* Elizabeth, 42 N. J. 249; Hudson *v.* Winslow, 6 Vroom, 437.

[4] Baltimore R. Co. *v.* Vanderwarker, 19 W. Va. 265; Usina *v.* Wilder, 58 Ga. 178; Lucas *v.* Beebe, 88 Ill. 427; Pinckard *v.* Milmine, 76 Ill. 453; Mix *v.* People, 86 Ill. 329; George *v.* Bischoff, 68 Ill. 236; Insurance Co. *v.* Bruce, 105 U. S. 328; School District *v.* Stone, 106 U. S. 183; In re Romford Canal Co., 24 Ch. D. 85; Webb *v.* Herne Bay Com., L. R. 5 Q. B. 642; Green's Appeal, 97 Penn. St. 342; Redwood *v.* Tower, 28 Minn. 45. It is held that a grantee is not estopped by a recital in his deed which declares the premises subject to an encumbrance from showing that the encumbrance had no existence in fact. Goodman *v.* Randall, 44 Conn. 321. Nor is one estopped by recitals of a person under whom one does not claim. Graves *v.* Colwell, 90 Ill. 612.

[5] Carpenter *v.* Buller, 8 Mees. & W. 209; McCullough *v.* Dashiell, 78 Va. 634, 648; ante, p. 352.

though it would perhaps be conclusive if the statement appears to have been made for the purpose of fortifying or establishing the title or claim in question in the litigation. With the intention accomplished, the recital loses force.[1] General recitals, on the other hand, do not operate to estop the parties from adducing contrary evidence, for certainty is of the essence of an estoppel.[2]

The effect of a recital by deed in the law of estoppel has in the past been considered to be due to the fact that it was made in a deed; and it is not clear that the same words in a sealed instrument would work an estoppel in those states in which the effect of a seal has been taken away by statute. It seems more likely that in such states the recited facts would not bind by way of *estoppel* unless the parties appear to have contracted for their truth or to have made the validity of the contract in which they are contained dependent upon the same.

We propose now to consider as at common law each of the classes of recital above mentioned.

§ 1. *Particular Recitals.*

Particular recitals appear to be declarations such as would be evidence by way of admission[3] or otherwise of some fact in dispute. At any rate, to work an estoppel a recital should clearly and beyond doubt affirm or deny some present or past fact or admit some liability definitely stated.[4] Such a recital was be-

[1] McCullough *v.* Dashiell, 78 Va. 634, 648.

[2] Jackson *v.* Allen, 120 Mass. 64, 79; School District *v.* Stone, 106 U. S. 183; Lainson *v.* Tremere, 1 Ad. & E. 792; Strowd *v.* Willis, Croke, Eliz. 762; Shelley *v.* Wright, Willes, 9; Salter *v.* Kidley, 1 Show. 59; Right *v.* Bucknell, 2 Barn. & Ad. 278; Kepp *v.* Wiggett, 10 C. B. 35; 2 Smith's L. C. 752, 6th Eng. ed.

[3] Sutton *v.* Casselleggi, 5 Mo. App. 111. See Carrigan *v.* Bozeman, 13 S. Car. 376. The date of a sealed instrument, though commonly but prima facie evidence, may become conclusive when it is of the essence of the instrument, and that has been accepted and acted on as valid and binding; as where a deed executed upon a proper occasion is dated back to give it effect. See Kelley *v.* State, 25 Ohio St. 567. So of a bond executed in fact on Sunday but dated otherwise, and then falling for value into the hands of an innocent party.

[4] Calkins *v.* Copley, 29 Minn. 471; School District *v.* Stone, 106 U. S. 183; Zimmler *v.* San Louis Water Co., 57 Cal. 221 (that the recital should be 'so certain as to admit of no other construction than that set up'). If founded on

fore the Queen's Bench in Lainson *v.* Tremere.[1] The action was upon a bond the condition of which declared by way of recital that by indenture of lease between the plaintiff's testator and the defendant the testator demised premises to the defendant at the yearly rent of £170. The defendant pleaded that the lease in the condition mentioned was a lease the reddendum of which was £140 only, and that that sum had always been paid. The whole lease was set out, by which it appeared that the rent was at £140 per year. But the court held the defendant to be estopped.[2]

mistake no estoppel will arise, at least in equity. Brooke *v.* Haymes, L. R. 6 Eq. 25.

[1] 1 Ad. & E. 792.

[2] Lord Denman, who delivered the judgment, said that the authorities were clear that if there was a condition to perform the covenants of an indenture, the obligor was estopped to deny the existence of the indenture; or in general, when the condition of a bond has reference to any particular thing, the obligor is estopped to say that there is no such thing. 1 Rolle's Abridgment, 872 b. He proceeded thus: 'The whole lease being set out, the defendant contends that the actual lease is to be taken as a further description of the lease recited in the condition of the bond, according to what is said by Holt, C. J. in Evans *v.* Powel, Comb. 377; and that the bond and lease are to be taken as together forming one instrument. And as it appears by the lease that the rent is £140 a year, the defendant says, as it is the lease which contains the real contract of the parties, and the rent being to be paid for the occupation of the land, that if he has paid the rent stipulated, he has performed the contract specified in the lease, and it is therefore an answer to the action; that the bond does not show the contract as to the rent, but is merely given as a collateral security for the performance of the terms of the lease; and if he has performed the terms of the lease, the bond cannot be enforced against him. But notwithstanding the argument, we think, as far as the bond goes in a court of law, the obligor is estopped from saying that the rent was not £170 a year, because his showing the lease at a rent of £140 is in effect the same thing as saying that there is no such lease as is stated in the bond. In 1 Rolle's Abridgment, 873 b, Estoppel, (P), pl. 10, 11, there is a case of Fletcher *v.* Farrer, as follows: "If the condition of an obligation be to do certain things for which the obligor is bound in a certain recognizance showing the certainty of it, then the obligor shall be estopped to plead that he was not bound in any recognizance inasmuch as the condition has reference to a particular. So the obligor in the case aforesaid shall be estopped to plead a special plea by which he owns that he acknowledged a thing in the nature of a recognizance, but upon the special matter it appears to the court it was not any recognizance in law; for this amounts but to this, that he was not bound in any recognizance." Upon what appears on the record there is no doubt but if an action of covenant had been brought on the lease, only £140 could be recovered; and there certainly is an apparent incongruity in saying that different sums are to be recovered according as the proceeding is on the bond or the lease. This, however, is occasioned by the defendant having executed two apparently inconsistent instruments.'

In a subsequent case[1] a declaration in covenant stated that by indenture, after reciting that the plaintiff had invented certain improvements in the construction of looms, and had obtained letters-patent for the sole use of the invention, and that he had agreed with the defendants to permit them to use the invention, the plaintiff covenanted to permit the defendants to use it; in consideration of which the defendants agreed to pay a certain sum. The declaration then alleged a breach of performance by the defendants. The latter pleaded that the invention was not a new one, and that the plaintiff was not the first or true inventor of the improvements. It was contended on the part of the plaintiff that the defendants were estopped from pleading the pleas mentioned; while counsel for the defendant contended that the pleas were consistent with the deed. The court decided that the pleas were bad, directly affirming the doctrine of Lainson *v.* Tremere, above presented.[2]

[1] Bowman *v.* Taylor, 2 Ad. & E. 278.

[2] Taunton, J. said: 'The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is whether there is a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital; but I do not see that a statement such as this is the less positive because it is introduced by a "whereas." Then the defendant has pleaded that the supposed invention in the declaration and letters-patent mentioned was not nor is a new invention. These words, "was not nor is a new invention," must be understood in the same sense as the words "had invented," in the recital of the deed set out in the declaration, and must refer to the time of granting the patent; and if the invention could not then be termed a new invention, it could not, I think, have been truly said in the deed that the plaintiff "had invented" the improvements, in the sense in which the deed uses the words. Then the plea directly negatives the deed, and comes within the rule that a party shall not deny what he has asserted by his solemn instrument under hand and seal.' The same judge thus distinguished the case from Hayne *v.* Maltby, 3 T. R. 438: 'Here there is an express averment in the deed that the plaintiff is the inventor of the improvements; there the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been though the assignor was not the original inventor.' Mr. Justice Patteson said: 'The only authority cited for the proposition that no estoppel can be by recital is that from Co. Litt. 352 b. It is not denied, however, that there have been many cases in which matter of record has been held to estop; but then it is said that the recital in those cases has been inseparably mixed with the operative parts of the deed. But if that be a test, the case is so here. The deed recites

Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties; but it may be a question whether the recital is so intended. If a proper construction of the recital, or other lawful evidence, shows that but one of the parties agreed to admit the fact, the other party will not be estopped by it.[1] Stroughill *v.* Buck, just cited, was such a case. It was an action on a deed of indenture between the plaintiff and the defendant, which recited that the defendant had advanced money to one Ogle on the security of certain deeds, and that the defendant was interested in those deeds to that extent; that it had been agreed that the plaintiff should make further advances to Ogle; and that the defendant should assign the deeds and his interest therein to the plaintiff as security. The

that the plaintiff has invented improvements and obtained a patent for the invention; and then it proceeds to a demise of the very subject-matter for which the patent is granted. I cannot separate these things; and I therefore think the recital here comes within the description which Mr. Wightman has given of the law laid down by the old cases. The passage in Lord Coke must be taken with some little qualification; and Lainson *v.* Tremere, 1 Ad. & E. 792 [supra], is a direct authority to show that there may be an estoppel by way of recital.' The doctrine of these cases has been held in several other English decisions. Horton *v.* Westminster Commissioners, 7 Ex. 780; Hill *v.* Manchester & S. W. W. Co., 2 Barn. & Ad. 544; Shelley *v.* Wright, Willes, 9. In Horton *v.* Westminster Commissioners Martin, B. said: 'This is an action upon an instrument under seal whereby the defendants have contracted to do certain acts; and in order to excuse themselves from performing them they ought to make out a clear legal defence. Now, the instrument itself states [by recital] that the defendants were authorized to borrow money for the purposes of the acts; and that in pursuance of the acts they had borrowed the money for which this bond was given. The first of these pleas in effect states that the money was not borrowed for the purposes of the acts; but I think that the defendants are estopped from setting up any such defence. It has been argued that the doctrine of estoppel does not apply here; but the case of Hill *v.* The Proprietors of the Manchester Water Works, 2 Barn. & Ad. 544, satisfies me that it does. The meaning of estoppel is this, that the parties agree for the purpose of a particular transaction to state certain facts as true, and that so far as regards that transaction there shall be no question about them. But the whole matter is opened when the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement. That is totally different from this case; for here the contract itself is perfectly legal, and though the plea is not the same, yet the case is substantially the same as that of Hill *v.* The Proprietors of the Manchester Water Works, which in my judgment is good sense and good law.'

[1] Stroughill *v.* Buck, 14 Q. B. 781; Young *v.* Raincock, 7 C. B. 310; Bower *v.* McCormick, 23 Gratt. 310; Blackhall *v.* Gibson, 2 L. R. Ir. 49.

defendant assigned them to the plaintiff, and covenanted that the money so advanced by him (the defendant) was due to him and unsatisfied. The action was for a breach of this covenant, the plaintiff alleging that the money was not due when the covenant was made. The question finally arose upon demurrer whether the plaintiff was estopped by the recital to allege that the money was not due. The court by Mr. Justice Patteson held that he was not. The plaintiff might deny that the defendant had made advances; for as this fact was material for the validity to the plaintiff of the securities on which he had advanced the money, and as he had taken the covenant to secure to him the truth of this fact, the true construction of the recital was that it was intended to be the statement of the defendant only.

If the parties to a deed bound the land conveyed upon a street, they are in an action concerning the boundary of the land estopped to deny the existence of the street.[1] In the case first cited a question arose upon the construction of a deed from R to T, in which the former conveyed to the latter a piece of land in New Bedford, bounding it southwardly and westwardly on a way or street. Chief Justice Parker said that by this description the grantor and his heirs were estopped from denying that there was a street or way to the extent of the land on those two sides. This was not merely a description, but an implied covenant that there were such streets. It probably entered much into the consideration of the purchase that the lot fronted upon two ways which would always be kept open, and, indeed, could never be shut without a right to damages in the grantee or his assigns.[2] And recently it has been decided by the same court, but certainly upon a questionable view of

[1] Parker *v.* Smith, 17 Mass. 413; Donohoo *v.* Murray, 62 Wis. 100, 103; Bartlett *v.* Bangor, 67 Maine, 460; Bell *v.* Todd, 51 Mich. 21, 26; White *v.* Smith, 37 Mich. 291; Smith *v.* Lock, 18 Mich. 56. So too where the land is bounded on a private way not defined in the deed, but shown on a plan referred to therein and recorded in the registry of deeds. Fox *v.* Union Sugar Refinery, 109 Mass. 292; Morgan *v.* Moore, 3 Gray, 319; Lunt *v.* Holland, 14 Mass. 149; Davis *v.* Rainsford, 17 Mass. 207; Parker *v.* Bennett, 11 Allen, 388; Murdock *v.* Chapman, 9 Gray, 156; Sheen *v.* Stothert, 29 La. An. 630.

[2] See O'Linda *v.* Lothrop, 21 Pick. 292; Tufts *v.* Charlestown, 2 Gray, 271; Loring *v.* Otis, 7 Gray, 563.

the law of estoppel, that this estoppel is available as well by the municipality in which the street is located as by the parties to the deed.[1] But a description of land bounded on a street named does not amount to a covenant of the existence of a street of the width of the one named if it has since been closed, but only that there shall be a way of reasonable width.[2]

The recent case of Freeman *v.* Auld[3] involved the same principle. Premises had been conveyed to the defendant 'subject to certain mortgages now a lien on said premises: one made to the Home Insurance Company, to secure the sum of $4,000, with interest; and the other made to Ira A. Allen, to secure the sum of $1,000.' The court said that the defendant, by receiving his conveyance on these terms, had conclusively admitted the lien of the mortgages. If the conveyance had contained the further words, 'which the said grantee hereby assumes and promises to pay,' this would have caused a personal liability on the part of the defendant to pay the mortgages;[4] but it would have had no greater effect of subjecting the premises than was imposed by the clause as it stood.[5]

[1] Tobey *v.* Taunton, 119 Mass. 404. The evidence taken altogether, including monuments as well as the admission in the recital, made in this case a very strong chain, such as a jury would not be apt to break; but we would venture to doubt if either upon the distinction taken by the court or upon any other the recital or the whole evidence amounted to an estoppel in favor of a stranger.

[2] Walker *v.* Worcester, 6 Gray, 548. In the case cited the plaintiff claimed to be entitled by the terms of a deed to a street on his westerly boundary, sixty feet wide. 'The words of the deed, "westerly on Park Street,"' said the court, 'would seem to imply that there was a street there of that name. . . . If it had been once opened as a street by a former proprietor, but afterwards a large tract of land, including the street, had been sold as one parcel and the street closed up before any house-lots were sold (as on the evidence reported the jury must find), then the deed amounted to an implied covenant, and a grant, if the grantor owned it, that the grantee should have a right to a convenient street and passage-way. There would be nothing in that case to designate or limit the dimensions of the way thus granted by implication; but it must be presumed that some way was intended for the purposes of passing, indicated by the use of the word "street."'

[3] 44 N. Y. 50.

[4] Lawrence *v.* Fox, 20 N. Y. 268; Ricard *v.* Sanderson, 41 N. Y. 179. But as to this distinction see Birke *v.* Abbot, 1 Northeastern Rep. 485; 2 Story's Equity, p. 341, note, 13th ed.

[5] Parkinson *v.* Sherman, 74 N. Y. 88; Green *v.* Kemp, 13 Mass. 515; Housatonic Bank *v.* Martin, 1 Met. 294, 307; Johnson *v.* Thompson, 129 Mass. 398; Tuite *v.* Stevens, 98 Mass. 305; Howard *v.* Chase, 104 Mass. 249;

In Cutler *v.* Bower,[1] again, an action was brought upon a covenant to pay the sum of £2,200 by instalments in an indenture. The deed recited the grant of letters-patent to the plaintiff in 1841 for a certain invention, and also recited a deed dated July 23, 1842, by which the plaintiff granted the defendant the sole use of the patent subject to the payment of a certain royalty. The deed then recited that the defendant had agreed with the plaintiff for the absolute purchase of a half-interest in the patent subject to the indenture last mentioned, but with the benefit of one half of the royalty thereby reserved. It was then recited that in consideration of £2,200 for the purchase of half the patent and half the royalty, the plaintiff assigned and transferred the patent to a trustee for the defendant. The defence pleaded was that the plaintiff was not the first inventor, and that the patent was void. The court said that as there had been no eviction, the consideration had not wholly failed. The defendant was at all events bound by the indenture of July 23 to the royalty therein named, whether the patent was valid or not, as he would be estopped from denying the validity of the patent in an action upon that deed; and by the deed upon which the action had been brought he was entitled to half the royalty.

A similar question was raised in Hills *v.* Laming.[2] The action was covenant to recover a certain sum stipulated to be paid as liquidated damages for the breach of a covenant concerning the use of certain patents. It appeared that there had been a dispute between the parties about their rights under certain patents, which was finally adjusted by their entering into an agreement under seal, reciting that a certain patent had been granted to the defendant, and a certain other patent had been granted to the plaintiff, and that, to put an end to their differences respecting them, the parties covenanted that the defendant should have the exclusive use of the patent granted to the plaintiff under certain limitations, and that the plaintiff should have the exclusive use of the patent granted to the defendant

Smith *v.* Graham, 34 Mich. 302; Comstock *v.* Smith, 26 Mich. 306; Kennedy *v.* Brown, 61 Ala. 296; Bunkley *v.* Lynde, 47 Ala. 211; Jackson *v.* Thompson, 6 Cow. 178; Lee *v.* Clark, 1 Hill, 56.

[1] 11 Q. B. 973.

[2] 9 Ex. 256.

under similar limitations. The defendant pleaded to the action that the plaintiff's patents were not valid, that the inventions were not new, and that the plaintiff was not the first inventor. On demurrer the court held the plea bad, distinguishing the case from Hayne *v.* Maltby.[1]

The sureties in an administration bond, or a guardian bond, or the like are estopped by its recitals to deny that their principal had been duly appointed to the office in question.[2] So in the case of the bond of deputies given to the sheriff, if the bond recites that the parties signing were deputies, they will not be permitted to deny the allegation.[3] So also if the bond recites or stipulates that all the signers are principals, none of them can say against the obligee that he was a surety,[4] except — and the exception is probably confined to the case of a recital as distinguished from an express stipulation — upon showing that the obligee, at the time of the act done by him in prejudice, as alleged, of the supposed surety's rights, knew that that party was a surety.[5]

It has also been held in a suit upon a replevin bond that the obligors will not be permitted to deny that the property was that of the defendant in the attachment where the bond recited that the property had been 'attached as' his;[6] but a contrary doctrine has also been held with much apparent soundness, so far as the question turns alone upon the recital.[7] However, it

[1] 3 T. R. 438.

[2] Cutler *v.* Dickinson, 8 Pick. 386; Bruce *v.* United States, 17 How. 437; Shroyer *v.* Richmond, 16 Ohio St. 455; Norris *v.* State, 22 Ark. 524; Williamson *v.* Woodman, 73 Maine, 163; Jones *v.* Gallatin, 78 Ky. 491; State *v.* Mills, 82 Ind. 126. See also Father Matthew Soc. *v.* Fitzwilliams, 84 Mo. 406; Teutonia Bank *v.* Wagner, 33 La. An. 732.

[3] Cox *v.* Thomas, 9 Gratt. 312; Cecil *v.* Early, 10 Gratt. 198. Nor will a surety be permitted to say that his principal was dead at the time the instrument was executed. Collins *v.* Mitchell, 5 Fla. 364. So too the execution of a mortgage to a corporation estops the mortgagor to dispute the existence of the corporation. Franklin *v.* Twogood, 18 Iowa, 515; Lehman *v.* Warner, 61 Ala. 455; post, chapter 16.

[4] Menaugh *v.* Chandler, 89 Ind. 194.

[5] This appears to be the effect of the better authorities, for there is want of harmony in the cases. See 1 Parsons, Notes and Bills, 233, 234, where the cases are reviewed. The rule above stated would be accepted everywhere in equity, and it is apprehended that it is the true rule at law as well.

[6] Bursley *v.* Hamilton, 15 Pick. 40.

[7] Decherd *v.* Blanton, 3 Sneed, 373. But the question does not, it seems, turn alone upon the recital. The officer has been induced to deliver the property to the obligors upon the assurance that they make no claim to it, so that there arises an estoppel in pais. See Dezell *v.* Odell, 3 Hill, 215; Dewey *v.* Field,

is certain that if the recital is specific (as when it alleges that a writ was issued against the goods, chattels, lands, and tenement of the defendant, and a certain piece of property was levied upon by virtue of the writ), the obligor cannot deny that the property belonged to the defendant in the attachment[1] unless before forfeiture he surrendered the property in accordance with the terms of the bond.[2]

In like manner, where a deed described land as the premises on which the grantor resided, the parties were held estopped to deny that the premises were the homestead of the grantor.[3] So of a recital that land was formerly owned by A B.[4] And a recital in a chattel mortgage that the property mortgaged is personal estops the mortgagor to say it is real property, whatever the fact may be.[5] So too a widow, by executing a release in which she styles herself widow and sole devisee, is estopped to deny that she has elected to take under her husband's will.[6] And a deed which recites that the defendant has bargained, sold, and *delivered* certain property, estops him to dispute the delivery.[7] On the other hand, land may be excepted from a conveyance by recital of definite description, or by clear reference to some instrument containing a definite description of it.[8]

However, a particular and definite recital may be shown to refer to either of two subjects when intended to refer to but one, and if it cannot be shown which was intended, the estoppel must fail.[9] So where several particulars are set out in a description of land, some of which are found to be inapplicable to the premises, these may be rejected and the other unambiguous and correct statements relied upon as fixing the rights of the

4 Met. 381; Horne *v.* Cole, 51 N. H. 287; Dresbach *v.* Minnis, 45 Cal. 223; post, chapter 18.

[1] Gray *v.* MacLean, 17 Ill. 404; Michell *v.* Ingram, 38 Ala. 395; Dezell *v.* Odell, 3 Hill, 215; Dresbach *v.* Minnis, 45 Cal. 223; Dewey *v.* Field, 4 Met. 381; post, chapter 18.

[2] Page *v.* Butler, 15 Mo. 73. See also Sponenbarger *v.* Lemert, 23 Kan. 55; Haxtun *v.* Sizer, ib. 310; Staples *v.* Fillmore, 43 Conn. 510; Trueblood *v.* Knox, 73 Ind. 310.

[3] Williams *v.* Swetland, 10 Iowa, 51.

[4] Stevenson *v.* Saline Co., 65 Mo. 425.

[5] Ballou *v.* Jones, 37 Ill. 95.

[6] Dundas *v.* Hitchcock, 12 How. 256.

[7] Nevett *v.* Berry, 5 Cranch C. C. 291.

[8] McDonald *v.* Lusk, 9 Lea, 654.

[9] This is upon the principle, of course, of introducing evidence to show a latent ambiguity in a writing.

parties.[1] But a party is not estopped by a recital in his deed, or in a deed of an earlier grantor of the premises, that the title was derived in a particular way unless it appears that he claims under that title.[2]

It appears from several of the foregoing cases that there may be an estoppel by recital of a conclusion of law, as in the case of Hills *v.* Laming, where the defendant was held estopped to deny the validity of certain patents by reason of the recitals of a deed executed between him and the plaintiff.[3] And there is good reason for such a doctrine. It is a settled principle of the law of contracts that the compromise of a claim doubtful in law is binding, affording a sufficient consideration for a promise to pay money.[4] Hence the recitals of the deed, though admitting the validity of acts or instruments which in law were invalid, will preclude the parties in an action upon the deed from contesting the same.[5] So too in the absence of fraud or mistake a recital by deed of the existence of a judgment is a recital of the validity of the judgment;[6] for parties may agree to a recital which they know is not correct and bind themselves accordingly.[7]

It is held that where a party makes a deed confirming a former one to which he was not a party, he does not thereby adopt the recitals of the former deed so as to be concluded by them,

[1] Doane *v.* Willcutt, 16 Gray, 368; Wright *v.* Tukey, 3 Cush. 299; Whiting *v.* Dewey, 15 Pick. 428; Winn *v.* Cabot, 18 Pick. 553; Thatcher *v.* Howland, 2 Met. 41.

[2] Hovey *v.* Woodward, 33 Maine, 470. See Kidder *v.* Blaisdell, 45 Maine, 461; Great Falls Co. *v.* Worster, 15 N. H. 414, 450; Housatonic Bank *v.* Martin, 1 Met. 294, 307; Blackhall *v.* Gibson, 2 L. R. Ir. 49, 57.

[3] See also Independent Order of Aid *v.* Paine, 122 Ill. 625.

[4] 1 Story, Contracts, § 571, 5th ed.

[5] And there may be an estoppel in pais upon a man's liability in law; as in the case of the conduct of an indorser of a note or bill whose liability has in truth never been fixed. Libbey *v.* Pierce, 47 N. H. 309. See St. John *v.* Roberts, 31 N. Y. 441; Lucy *v.* Gray, 61 N. H. 151. But this would probably be true only of conduct understood to be an affirmation of *fact*, as that the indorser had received notice of dishonor. If understood to be a conclusion of law from a comparison of facts, propositions, or the like, quære if the party would be estopped to say the contrary? See Estoppel by Conduct, post. We have seen in considering the subject of judgments that it is a fundamental rule of law that a valid adjudication estops the parties from disputing, not only the facts found by the jury, but the legal conclusions of the court.

[6] Blackburn *v.* Ball, 91 Ill. 434.

[7] Ibid.

without language to that effect.[1] In the case cited, in order to prove the bankruptcy of one Shelton, and the assigneeship, recourse was had to two deeds, the former of which recited a sale to have taken place under a commission of bankruptcy against Shelton, and conveyed to the defendant lands sold thereunder by his assignees. To this deed the defendant was not a party. By the latter deed the defendant, acting upon the former, executed a settlement of the land upon himself after a certain event. The latter deed was silent respecting the bankruptcy. It was contended that the defendant had recognized and adopted the former deed by the latter. But the court held otherwise. Lord Denman said that there was no authority for such a general proposition that a party claiming like the defendant adopted the statements of an anterior deed which went to make up his title.

According to the current of authority definite recitals in municipal bonds, of preliminary facts relating to the regularity of their issuance, such as the performance of certain conditions or taking certain steps required by law, stand upon the same footing with recitals in ordinary deeds, and hence will estop the municipality, just as they would a private corporation or citizen, from disputing the facts.[2] But the courts of New York have steadily refused to accept this position, and in all ordinary cases treat the recitals as open to dispute.[3] This, however, has nothing to do in any case with the right of a corporation, municipal or other, to deny its entire *power* to do an act in question; the recital is binding only upon the assumption that the corporation has the power, upon performing the required conditions, to make the instrument containing the recital. No recital of such power of the corporation is binding.[4]

[1] Doe d. Shelton *v.* Shelton, 3 Ad. & E. 265, 283.

[2] Cromwell *v.* Sac, 96 U. S. 51; Block *v.* Commissioners, 99 U. S. 686; Hackett *v.* Ottawa, ib. 86; Orleans *v.* Platt, ib. 676, 682; Lyons *v.* Munson, ib. 684; Buchanan *v.* Litchfield, 102 U. S. 278; Menasha *v.* Hazard, ib. 81; Tipton *v.* Locomotive Works, 103 U. S. 523; Harter *v.* Kernochan, ib. 562; Jasper *v.* Ballou, ib. 745; Insurance Co. *v.* Bruce, 105 U. S. 328; School District *v.* Stone, 106 U. S. 183; Jenkins *v.* International Bank, 127 U. S. 484; Lake *v.* Graham, 130 U. S. 674; Webb *v.* Herne Bay Com., L. R. 5 Q. B. 642; post, chapter 16.

[3] Starin *v.* Genoa, 23 N. Y. 439; Cagwin *v.* Hancock, 84 N. Y. 532; Ontario *v.* Hill, 99 N. Y. 324.

[4] Northern Bank *v.* Porter, 110 U. S. 608. See Carroll *v.* Smith, 111 U. S. 556. Further see chapter 16.

§ 2. *General Recitals.*

General recitals, on the other hand, do not ordinarily estop the parties from disputing the statements made in them, because, as we have said, the certainty essential to every estoppel is wanting.[1] And it is perfectly consistent with a recital of intention or purpose to show that the intention or purpose was afterwards changed;[2] for the recital relates only to present intention.

In Right *v.* Bucknell,[3] which was an ejectment, it appeared that the plaintiff claimed under a release which recited that the grantor was 'legally or equitably' seised of the premises. The defendant having acquired the legal title, it was held that he was not estopped to rely upon it. Lord Tenterden said that it was a rule that an estoppel should be certain to every intent; and therefore if the thing could not be precisely and directly alleged, or if it were mere matter of supposal, it was not an estoppel. In the present case there was a want of that certainty of allegation in the recital which was necessary to make it an estoppel.

The case of Kepp *v.* Wiggett[4] is still more in point. In that case the condition of a bond recited that a certain person 'had been duly nominated and appointed collector.' The court held that upon a construction of the deeds this recital did not estop the defendants from showing that there had been no complete appointment of the person as collector.[5] The same is true of a recital in a deed that 'immediate possession is delivered.'[6]

[1] Right *v.* Bucknell, 2 Barn & Ad. 278; Muhlenberg *v.* Druckenmiller, 103 Penn. St. 631; Sheffey *v.* Gardiner, 79 Va. 313. Sometimes a party may be concluded without an express recital or affirmation, where it is evident from the tenor of the deed that it was the intention of the parties that a certain state of facts should be affirmed as the inducement to the deed. See Van Rensselaer *v.* Kearney, 11 How. 297; post, chapter 11.

[2] See Denman *v.* Nelson, 31 N. J. Eq. 452.

[3] 2 Barn. & Ad. 278.

[4] 10 C. B. 35.

[5] Maule, J. observed: 'As to the question of estoppel it appears to me that the matters that are stated in the case, — some of them by recital in the condition of the bond, — and which were in the knowledge of all parties, show that in speaking of the appointment of Lee as collector they did not mean that he was fully armed with authority to collect the sum assessed. He had been appointed to collect, and was the person who was intended to

[6] Sheffey *v.* Gardiner, 79 Va. 313.

The distinction between a conveyance by general and one by particular description is further illustrated by Doe d. Butcher *v.* Musgrave.[1] The action was ejectment to recover a certain canonry under a demise for ninety-nine years of 'all that the canonry of him, the said R. A. Musgrave, of the king's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments *belonging thereto*, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the said canonry belonging.' The question was whether the action could be maintained either for the canonry, or for the house in which the defendant resided as a canon of Windsor. It did not appear that any other property had been specifically appropriated to the canonry, and the argument of counsel had been confined to the case of the house. It was held that there was no estoppel.[2]

The operation of an uncertain recital was considered by the Supreme Court of Pennsylvania in a recent case.[3] An action of

be armed with power to collect and enforce payment of the sums assessed. Still, he was a collector within the sense and meaning of the expressions used in the bond. I therefore think that the doctrine of estoppel does not apply.' Mr. Justice Williams thus stated the position: 'As to the remaining question, whether the defendants are estopped by the recitals in the bond from setting up this defence, it is to be observed that it is a rule that estoppels must be *certain* to every intent. And here it is at least doubtful whether the recital that Lee had been duly nominated and appointed a collector for the year ending the 5th of April, 1847, and that duplicates of the assessment had been delivered and given in charge to him, with a warrant or warrants for collecting the same, should be referred to the assessments under schedule (A) or schedule (D). I therefore think there is no estoppel.'

[1] 1 Man. & G. 625.

[2] 'A preliminary objection,' said the Chief Justice, 'has been taken on behalf of the lessor of the plaintiff, that as between her and the defendant, as mortgagee and mortgagor, the defendant is estopped by the mortgage deed from denying that he has the title he therein assumed to have, or from setting up title in any one else. I entirely concur in that as a general proposition; but the question here is, not whether the defendant may set up a title in some third party, but whether he may not say that the house is not comprised in the description contained in the mortgage deed. If the house had been included in the mortgage by a particular description, the defendant could not have been allowed to say he had no title, and that the house belonged to the dean and chapter, he having only a permissive occupation. But here the subject-matter of the mortgage is described to be all that the canonry of him, the defendant, of the king's free chapel at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto.'

[3] Noble *v.* Cope, 50 Penn. St. 17.

debt was brought on a bond of indemnity given to a sheriff, which recited that he had paid to the defendant a sum of money, the proceeds of a sale of the goods and chattels of one Christian Klusmeyer, under a fieri facias 'at the suit of the said' defendant. The fact was that the sheriff had had in his possession the goods of several different parties levied upon under sundry executions against Klusmeyer, and that he had sold under the writ of one Collmar, and not of the defendant. It was alleged by the plaintiff that subsequently to the execution of the bond it was ascertained that the defendant was not entitled to any part of the proceeds of the sale as against the other execution creditors of Klusmeyer; and the present action was brought to recover the money paid, for which the bond had been given. The defendant contended that the plaintiff was estopped by the recital in the bond; but the court overruled the objection. Chief Justice Woodward said that the bond did not assert that the sale was made alone on the defendant's writ; it was a fair construction of the recital that the sale was made on that writ in connection with others. The sheriff's return showed that he had levied and sold by virtue of Collmar's writ, as well as by that of the defendant. There was no inconsistency between these facts and the recital in the bond. Estoppel excluded facts inconsistent with itself, but not such as agreed with it. The sheriff, moreover, had not recognized an absolute right in the defendant to the money paid; if he had, he would not have taken the bond. The bond stood in the place of the money during the litigation between the execution creditors; and if the effect contended for were to be given to the recital, it would be nullified.

The case of Naglee *v.* Ingersoll[1] is an instance of the effect of a general recital. There had been a grant of land 'along low-water mark to the mouth of Cohocksink Creek before it was diverted and thrown to the north by the erection of wharves,' and it was held that the parties and privies were not estopped from denying that there was any encroachment by the creek which interfered with the possession of the grantee.[2]

[1] 7 Barr, 185.

[2] Mr. Justice Bell, speaking for the court, said: 'How far the encroachment infringed on the original course,

This subject is illustrated also in Farrar *v.* Cooper.[1] The question raised was whether a testator, the grantee in certain deeds of mill privileges, was estopped by a recital of the existence of another mill-site above to deny the right of occupancy of it. The court held that he was not estopped. Though the testator might not be allowed to deny the existence of the mill-site, the Chief Justice observed, with the privileges and appurtenances belonging to it, still, among them the right of prior occupation was not stated as appurtenant to the site. The conveyances were all silent respecting such a right; and the testator by denying it would not necessarily contradict anything stated in them. Nor will a general and indefinite recital in a replevin bond concerning the amount of property replevied estop a surety to show how much of the property in the writ was in fact replevied.[2]

But a general recital may sometimes work an estoppel; and whether it does or not will depend upon a proper construction of its terms and the intention of the parties.[3] The case first cited, as stated by Mr. Baron Martin, was an action on a bond conditioned for the performance of covenants by the defendant and H. Warden in a deed dated in 1847; and the breach was that they broke a covenant to perform certain acts mentioned in the deed. There was a plea by way of estoppel in confession and avoidance. The plaintiffs replied setting out the indenture; and there was a demurrer to the replication. It then appeared that by an instrument under seal in 1854 the parties stated that,

whether one inch or one hundred feet, is not even hinted at. Nay, it is not expressly averred that it continued to exist at the period of the conveyance, nor is there anything to show except inferentially that the defendant could not at once have possessed himself of the whole one hundred and fifty-nine feet conveyed. Without laboring the argument it is perhaps sufficient to say that the extent and continued existence of the alleged encroachment being thus left at large was open to the inquiry of the jury as matter of fact both as to its continued existence and its alleged extent. It was certainly competent to the plaintiffs to show that it interfered not with the defendant's possession beyond one inch, and if so, to prove it did not interfere at all; for the inquiry once entered upon there was nothing in the deed itself to limit a point at which it should be stayed.'

[1] 34 Maine, 394.

[2] Miller *v.* Moses, 56 Maine, 128; State *v.* Nguert, 2 Mo. App. 295.

[3] Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520; Carpenter *v.* Buller, 8 Mees. & W. 209.

with the exception of certain claims contained in the schedule, the plaintiffs and the defendant and H. Warden had settled, adjusted, and mutually satisfied every other account, claim, or demand arising out of the contract on which the action was brought. It was contended that as the language was general, the effect which the court was to give to it did not depend upon the intention of the parties. The court, however, ruled otherwise.[1]

[1] The learned baron above named said: 'Every deed must be construed according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the court cannot look at collateral matters, but the intention of the deed as appearing upon the face of it must be regarded. If in the present case it had appeared that the parties intended to abandon every claim except those referred to in the schedule, the argument on the part of the defendant would have been unanswerable. But when the whole deed is looked at, no such intention appears. The parties intended to refer certain matters to arbitration. They introduce the recital that, "whereas, with the exception of the claims of the said Charles Warton and Henry Warden contained in the schedule, the said Charles Warton and Henry Warden and the Southeastern Railway Company have settled, adjusted, and mutually satisfied every other account, claim, or demand which the said parties have or hath against each other arising out of the said contract, or any other account, matter, or thing whatsoever, as they the said Southeastern Railway Company and the said Charles Warton and Henry Warden do hereby severally admit and acknowledge; but the claims of the said Charles Warton and Henry Warden, contained and set forth in the said schedule, as well as the amount claimed thereby, are disputed." And the recital goes on to state that it had been agreed that the claims contained in the schedule should be referred to an arbitrator. The true meaning of the deed is that the arbitration shall be confined to the matters specified in the schedule; and the admission is made for the purpose of that deed. I do not think that the parties ever contemplated that whatever cause of action either might have against the other should finally cease. A recital in such a deed would be binding, if it was the bargain on the faith of which the parties acted. But that is not the case here. Neither is this an estoppel by means of a recital contained which is the foundation of the action. See Carpenter *v.* Buller, 8 Mees. & W. 209. . . . The arbitration was a wholly collateral matter. The admission is evidence, and may be strong or of very little value, according to circumstances. Here I collect from the deed that it was not the intention of the parties to prevent the plaintiffs from bringing such an action as the present.' Channell, B. observed: 'If we could see the parties had agreed to release all other claims in consideration of the agreement to refer, then there might be an estoppel; but that does not appear to have been their meaning. On these grounds the plaintiffs are entitled to judgment. It was said that this is not a question of intention. It may be that when a deed contains a recital of a particular fact in express terms the effect of the recital cannot be got rid of by showing what the intention of the parties was. But when the language is general we may collect the intention from the terms of the whole deed; and in that way we have endeavored to arrive at the true construction of the deed in the present case.'

The rule respecting the recital of immaterial or unnecessary matters is the same as that in relation to general recitals; the recital does not work an estoppel.[1] The doctrine seems to rest on that of a case already presented[2] in which it was held that a party to an instrument under seal is not estopped in an action by the other party not founded on the deed, but collateral to it, to dispute the matters recited; and so the court of New York observed in the case above cited.

The date of a deed may be denied when it is immaterial, though not otherwise.[3] In the case first cited the plaintiff executed a deed to the Rockingham Manufacturing Company, bearing date the 28th of January, 1836, and the company were not organized until the 10th of February, 1836, though incorporated the November preceding, and in fact this agreement was made on the 22d of January, 1836, before the date of the deed and the organization of the company. But the court said that the date of a deed might always be controlled by evidence of the actual delivery. Here the agreement recited the deed, and recited that it was then made and so made at their request, and this was conclusive that the deed was then made, and the date was immaterial.

The ground of the estoppel, indeed, appears in those cases in which a party is held not estopped by a statement in a deed unless it appears that there was an intention that the statement should not be questioned, or that injustice would follow if the court were to allow it to be contradicted.[4] In Hays *v.* Askew, just cited, it was said by Mr. Justice Pearson that to render a recital an estoppel it must show that the object of the parties was to make the matter a fixed fact as the basis of their action. In the case of Den d. Brinegar *v.* Chaffin[5] it had been laid down

[1] Reed *v.* McCourt, 41 N. Y. 435; Walker *v.* Sioux City Co., 65 Iowa, 563 (unnecessary matter of law); Champlain R. Co. *v.* Valentine, 19 Barb. 484. See also Deery *v.* Cray, 5 Wall. 795; Comings *v.* Wellman, 14 N. H. 287, 293.

[2] Carpenter *v.* Buller, 8 Mees. & W. 209.

[3] Dyer *v.* Rich, 1 Met. 180; Cady *v.* Eggleston, 11 Mass. 282, 285; Kimbro *v.* Hamilton, 2 Swan, 190. See Washington Co. Ins. Co. *v.* Colton, 26 Conn. 42.

[4] Hays *v.* Askew, 5 Jones, 63; Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520; Blackhall *v.* Gibson, 2 L. R. Ir. 49, 57.

[5] 3 Dev. 108.

upon that ground that there was no estoppel to either party to a deed of bargain and sale to show that one of the bargainors, recited to be a feme covert, was in fact a feme sole at the time the deed was executed.[1] The same doctrine applies to the acknowledgment of receipt of the consideration in a deed; the recital, according to the weight of authority, is not conclusive. Mr. Justice Cowen, as we shall see, expressly rests the case upon the principle above set forth.[2]

[1] Henderson, C. J. speaking for the court, said: 'Recitals in a deed are estoppels when they are of the essence of the contract; that is, where unless the facts recited exist the contract, it is presumed, would not have been made. As if A recites that he is seised in fee of certain lands which he bargains and sells in fee he is estopped to deny that he is seised in fee; for without such seisin it is fair to presume that the contract would not have been made. But if the recital be that he is seised in fee by purchase from C, here neither the bargainor nor bargainee is estopped from averring and proving that he is seised by purchase from D, unless it appear that the seisin in fee by purchase from C was part of the contract, and without which it would not have been made. For ordinarily the seisin only is of the essence of the contract, and how and from whom derived are but circumstances. So of every other recital. And this distinction reconciles the many apparent contradictions in the books, some declaring that recitals are estoppels and others that they are not. In the case under consideration, that the feme was the wife of Jacks was not of the essence of the contract. It formed no part of it. It was a mere circumstance of description, more unfavorable to the defendant or rather the bargainee than if she had been sole. For if sole, the deed was effectual by sealing and delivery. If she was covert, her private examination was necessary to make it her deed. In truth, her coverture was a fact for which the bargainee neither gave nor received anything. Nor did he on that account receive anything by the deed which he would not have received if she had been sole. Neither did it form the basis nor in any manner move or conduce to the contract. It is therefore mere matter of evidence, and like all other evidence may be rebutted by contrary proof. . . . But the case does not rest upon general reasoning. If A S by his deed, reciting that she is a feme covert when in truth she is a feme sole, grants an annuity, it is a good grant, for that is but a void recital although the grantee had not put it in his writ; and it cannot be a conclusion to him when he shows the deed. Viner's Abr. M. s. 8, pl. 11; Perkins, s. 40. So if a feme covert, reciting by her deed that she is a feme sole, grant an annuity, this is a void grant, and she shall not be concluded by this recital.' Perkins, s. 41, note.

[2] McCrea *v.* Purmort, 16 Wend. 460; post, chapter 15.

CHAPTER XI.

TITLE BY ESTOPPEL.

§ 1. *History of the Subject.*

THE subject upon which we now enter[1] presents at once the most striking and the most complicated doctrine in all the 'curious learning'[2] of estoppel. An estate by estoppel arises, generally speaking, in cases where a grantor without title makes a lease or conveyance of land by deed with warranty, and subsequently by descent or by purchase acquires the ownership. This after-acquired title of the grantor 'inures,'[3] it is usual to say, by estoppel to the benefit of the grantee.[4] It would perhaps more accurately state the situation, under our modern deeds of conveyance, to say that the deed, which the grantor engages to warrant and defend, is a solemn stipulation that the grantor has the title which he is now about to transfer to the grantee as a purchaser for value. In the face of this he cannot be heard to say, after making the transfer, that he had not that title at the

[1] Chapter XI. of Rawle on Covenants for Title is recommended for study in connection with the following pages. In the 5th edition of that acute and learned work the author, now, unfortunately, deceased, examined the subject of title by estoppel afresh, and threw much new and valuable light upon it. No one did more to refute the vicious doctrine, which has found favor in some states, that estoppel by deed is, or should be made to be, a conveyance. To Judge Hare, however, in his notes to the Duchess of Kingston's Case, 2 Smith's Leading Cases, is due the credit of starting the true view.

The reader is also referred to the chapter on this subject in Tiedeman, Real Property.

[2] 'Touching estoppels, which is an excellent and curious kind of learning,' etc. Coke, Litt. 352 a.

[3] A favorite expression used to be that the after-acquired estate 'feeds' the estoppel.

[4] Such covenants in a deed by a husband would not bar the grantor from claiming statutory homestead, existing at the time of executing the deed. Doyle *v.* Coburn, 6 Allen, 71; Silloway *v.* Brown, 12 Allen, 30, 33. The deed need not be attested to enable it to raise an estoppel against the grantor, on the covenants. Contra, against a purchaser from him even with notice. Chamberlain *v.* Spargur, 86 N. Y. 603; Wood *v.* Chapin, 3 Kern. 509, under statutes.

Title by estoppel is peculiar in this matter of binding after-acquired interests. See ante, p. 143.

time. So his new title lies *lifeless* in his hands against such purchaser; the estoppel not being a true conveyance.[1]

By the old common law only four kinds of assurance possessed the efficacy to pass an after-acquired estate, — the feoffment, the fine, the common recovery, and the lease. The last named is the only one of these that has come down to us and is now in use. The common recovery long since became obsolete, and seems to have left little or no trace of its existence in America. The fine was substantially an acknowledgment of a feoffment of record; and we may pass this too as affording no independent aid to our present inquiries, and proceed to the consideration of the first-mentioned and most important species of assurance, the feoffment.

This kind of conveyance, says the Touchstone,[2] was the most ancient in use, and in some respects exceeded in efficacy that by fine or recovery; for it was of such a nature, by reason of the livery of seisin ever inseparably incident to it, that it removed all disseisins, abatements, intrusions, and other wrongful and defeasible titles, and reduced the estate clearly to the feoffor, and through him to the feoffee, when the entry of the feoffor was lawful; which neither fine, recovery, nor bargain and sale by deed indented and enrolled would do when the feoffor was out of possession by disseisin. And the learned editor of the Touchstone, Mr. Preston, in a note to this passage says that to make a feoffment good and valid, nothing was wanting but possession; and when the feoffor had possession, though entirely naked, yet a freehold or fee simple passed by it against the feoffor by reason of the livery.

The feoffment passed not only all present estates and interests of the feoffor, but also barred and excluded him (and his heirs prior to the statutes de bigamis[3] and quia emptores[4]) from all future estates, rights, and possibilities in favor of the feoffee.[5] This effect of barring all future interests was produced, it has been said, by the presence of the word 'dedi' in the charter of

[1] Otherwise a voluntary grantee would acquire the new estate; which is not true.

[2] Page 203.

[3] 4 Edw. 1, c. 6.

[4] 18 Edw. 1, c. 1.

[5] Touchstone, 204.

feoffment, which word imported a warranty to defend the estate.[1] We must now ascertain the character and operation of this ancient warranty.

As defined in the work to which we have before referred[2] the warranty was a covenant real, annexed to an estate of freehold or inheritance, whereby a man and his heirs were bound to warrant the same, and either upon voucher or by judgment in a writ of warrantia chartæ to yield other lands and tenements to the value of those of which there should be an eviction, in which case the party received a compensation for the lands lost; or the warranty might be used by way of rebutter, in which case it operated as a defence to the possession.[3]

The effect of the warranty was to bar and conclude the warrantor personally (and before the statutes already mentioned his general heirs as distinguished from his heirs in tail of the land so warranted) forever, so that all his rights, present and future, were bound.[4] 'And therefore,' in the example given in the Touchstone, 'if the father be disseised, and the son in his lifetime release all his right to the land to the disseisor, and make a warranty in the deed, and then the father dieth and the right descendeth to the son, albeit the release doth not bar the son, yet the warranty doth bar him.'

In the case of assets the warranty, if lineal, was a bar of an estate in tail against the heir; and if the warranty was collateral, it was a bar with or without assets (except in cases provided for

[1] Touchstone, 184; Coke, Litt. 383, 384. We shall have something to observe on this word somewhat later.

[2] Touchstone, 181.

[3] The subject is more fully explained by Blackstone. 'By the feudal constitution,' he observes, 'if the vassal's title to enjoy the fee was disputed, he might vouch or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so by our ancient law if before the statute of quia emptores a man enfeoffed another in fee by the feudal verb "dedi," to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. . . . But in a feoffment in fee by the verb "dedi" since the statute of quia emptores the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure and of course the ancient services resulting back to the superior lord of the fee.' 2 Black. Com. 300.

[4] Touchstone, 182. As to the heir see Bracton's Note Book, case 944.

by statute) of an estate in fee simple or fee tail, and all possibility of right thereunto.

A word is necessary upon the perplexed subject of collateral warranty. This mode of assurance of title arose after and by reason of the passage of the statute de donis conditionalibus. Previous to that act, or rather previous to the statute of Gloucester, passed a little earlier, the heir was in every case bound by the ancestor's warranty. As a covenant real the warranty descended upon him, and bound him, even though he claimed title from a third person. These statutes were intended respectively to relieve the heir from such injustice, and to establish entails. The statute of Gloucester protected the son of tenant by the curtesy from the father's warranty. He was now safe when he claimed title from his mother. The statute de donis went further, protecting the son generally from the father's warranty in the father's feoffments of his own estate; but this was the extent of the protection. The doctrine of warranty still prevailed in other cases;[1] and so when it happened that the son was heir also of one who was collateral to the title to the land in question, as where he was heir of his uncle as well as of his father, it was only necessary for the collateral ancestor to make a warranty of the land. This descended still upon the heir, and bound him to warrant just as it did before the statute. Thus was a contrivance found to avoid the effect of the above-named statutes; and it was called collateral warranty. The warranty was collateral to the title; not necessarily, it should be observed, collateral to the blood. The father's warranty might be collateral as well as the uncle's in the case above put; as where the title to the land had been in the uncle, and his nephew was his heir.[2] An entail could so be effectually barred; and

[1] And it was held still to prevail if the heir received by descent another estate from the ancestor equal to that conveyed by the latter. 2 Inst. 293; Rawle, Covenants, 6, 7, 4th ed.

[2] No part of the law is more complicated than this subject of collateral warranty has been *made*. 'If Littleton,' said Vaughan, C. J. in Bole *v.* Horton, Vaughan, 375, 'had taken that plain way in resolving his many excellent cases in his chapter of warranty, of saying the warranty of the ancestor doth not bind in this case because it is restrained by the statute of Gloucester or the statute de donis, and it doth bind in this case as at the common law because not restrained by either statute (for when he wrote, there were no other statutes restraining war-

this evasion of the policy of feudalism, modified somewhat by modern statutes,[1] was a recognized mode of assurance in England until within about fifty years of the present time.[2]

And in either sort of warranty, lineal or collateral, if the warrantor should implead the warrantee the latter (the tenant) might show the warranty and demand judgment whether contrary to the warranty the warrantor should be suffered to demand the thing warranted; and this was called a rebutter. This rebutter was given as a defence to the title to avoid circuity of action; since if the demandant were to have recovered contrary to the warranty, the other party would recover the same lands or lands of equal value by force of the warranty.[3]

The warrantee, again, might at any time before he was impleaded for the land bring a writ of warrantia chartæ upon the warranty in the deed, against the warrantor or his heirs; and by this proceeding all the land that the heir had from the ancestor was bound and charged with the warranty in the hands of all persons to whom it should afterwards go, from the impetration of the writ; so that if the land warranted should afterwards be recovered from the warrantee, he should be entitled to recover other lands of the heir, or of the warrantor if living.[4]

ranties; there is now a third, 11 H. 7), his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all, his cases. For no man's warranty doth bind or not, directly and a priori, because it is lineal or collateral, for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms. But those are restraints by consequent only from the restraints of warranties made by statutes.'

[1] See St. 4 and 5 Anne, c. 16, § 21, by which the collateral warranty of an ancestor having no estate of inheritance in possession was declared void against the heir. This rendered void against an heir the warranty of one who was merely tenant by the curtesy, and had no other estate of inheritance. But the warranty of a tenant in tail still falls upon the heir in England. 2 Black. Com. 303; Russ *v.* Alpaugh, 118 Mass. 369, 373. The common law of collateral warranty, if in force in Massachusetts, is so only as modified by this statute of Anne. Ibid. Collateral warranty as it stood before the St. 4 & 5 Anne probably never prevailed in this country. Ibid.

[2] Warranties and real actions generally were abolished by 3 and 4 Will. 4, c. 27, § 39; ib. c. 74, § 14. See further in regard to collateral warranty, Rawle, Covenants, c. 1; Russ *v.* Alpaugh, 118 Mass. 369; Southerland *v.* Stout, 68 N. C. 446.

[3] Coke, Litt. 265; Touchstone, 182.

[4] Touchstone, 184. The remedy of

These observations are sufficient to show that the old common-law warranty was wholly different in character from the covenants now in use in the conveyance of real estate. The old warranty, before the statute de donis, ran with the land and operated against the heir regardless of assets from the feoffor; and after the statute the same was true of collateral warranty. The modern covenant affects only the grantor unless, first, the heir have assets from him, and then only to the extent of such assets,[1] or unless, secondly, the heir claim the land as heir of the grantor; in which latter case the land would itself become assets in the hands of the heir (if he were allowed to recover), with which he must as in the other case respond to his ancestor's covenant of warranty.[2]

The policy of the law, it will thus be seen, is to prevent circuity of action. If the heir, having assets from his father the grantor, were to be allowed to recover the land which the father had conveyed with warranty, though the title had come to him from his mother or from any other collateral source, he would be compelled at once to respond to his father's covenant to the extent of his assets (not exceeding of course the value of the land); so that he would be in no better position in a pecuniary aspect, which alone the law regards, after the litigation than before. The law, therefore, wisely holds him estopped, or more properly rebutted, from claiming the land. And the same would be equally true if he should claim the land as heir of his father (under a title acquired by the father after the conveyance), regardless of assets; for the land, if a recovery were permitted, would itself become assets.

This is upon the supposition that the warranty is in the usual general form, for the grantor, his heirs and assigns; but if the warranty should be personal only, and not for the heir also, the latter would not be barred even with assets from claiming the land from another source, as from his mother; since this would be no breach of the warranty, and there would be no place for

recovering other lands in such a case was never in use in Massachusetts. Russ *v.* Alpaugh, 118 Mass. 369; Marston *v.* Hobbs, 2 Mass. 433, 438.

[1] Carson *v.* New Bellevieu Cem. Co., 104 Penn. St. 575; Utterback *v.* Phillips, 81 Ky. 62. Without warranty the heir is not bound. Bohon *v.* Bohon, 78 Ky. 408.

[2] See Russ *v.* Alpaugh, supra.

a rebutter. He could not, however, claim the premises as heir of the grantor in this or in any other case, for as such a claimant he would be in privity with the grantor, and would be estopped accordingly.

So much as introductory to what we have to say upon the existing law, and as showing the origin of this branch of the doctrine of title by estoppel. We shall recur to the subject hereafter in discussing the respective rights of a grantee before title acquired and a grantee after, under our existing modes of conveyance. We turn now to the modern doctrine; and first, of leases by estoppel.

§ 2. *Leases: Where no Interest passes an Estoppel arises.*

It is an established rule of law, regardless of covenant, and therefore unlike the case above considered, that where no interest passes by a sealed lease, an estate by estoppel is created between the parties and those claiming under them in case of a subsequent acquisition of title by the lessor. The newly acquired title 'feeds' the estoppel. Thus, in the example put in the case of Trevivan *v.* Lawrance [1] if a man makes a lease by indenture of D, in which he hath nothing, and afterwards purchases D in fee and suffers it to descend to his heir, or bargains and sells it to A, the heir or A shall be bound by this estoppel, and so shall the lessee and his assignee. For when an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel.

Mr. Preston,[2] in speaking of this doctrine, says that the lease first operates by way of estoppel; and finally, when the grantor obtains an ownership, it attaches on the seisin and creates an interest, or produces the relation of landlord and tenant. There is a term *beginning* by estoppel, but for all purposes it becomes an estate or interest. It binds the estate of the lessor, and therefore continues in force against him and his heir. It also binds the assigns of the lessor and the lessee.

[1] 1 Salk. 276; s. c. 6 Mod. 258; 2 Ld. Raym. 1036.

[2] 2 Preston, Abstracts, p. 210, as cited by Tindal, C. J. in Webb *v.* Austin, 7 Man. & G. 701, 724.

We must now consider the converse of this rule; for though it does not strictly present the subject of an estate by estoppel, it is still so intimately connected with the subject just considered that any separation would seem unnatural and forced.

§ 3. *Leases: Where an Interest passes no Estoppel arises.*

The converse of the above-stated rule is also true, that where an interest passes by the deed of lease, there is no estoppel.[1] Doe d. Strode *v.* Seaton was an ejectment to recover certain premises in the city of Bristol, against the assignee of a lessee for years. It appeared that the lessee had covenanted to pay rent and deliver possession of the premises at the end of the term to the lessor, his heirs and assigns. The action was brought by the devisee of the lessor after the expiration of the term. The assignee proposed to show that the lessor was only tenant for life of the premises; while the plaintiff contended that he was estopped by the deed. The defendant prevailed.[2]

This point arose again in a recent case,[3] in which the Vice-Chancellor said that it was conceded that if a termor, or the owner of any estate in land which might possibly be sufficient to allow an interest created by his deed to take effect out of

[1] Coke, Litt. 47 b; Doe d. Strode *v.* Seaton, 2 Crom. M. & R. 728. But it is held that this rule applies only to the case of leasehold estates; and that in the common conveyance with warranty the estoppel applies against the grantor in respect of after-acquired interests as well where he had an estate at the time of the grant as where he had none. House *v.* McCormick, 57 N. Y. 310.

[2] 'Is there any case,' said Mr. Baron Parke, 'which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel because Colonel Strode, having a life estate, had a right to grant a lease for twenty-one years determinable upon his life, and therefore an interest passed; and where an interest passes there is no estoppel. In Coke, Litt. 47 b, it is said: "A, lessee for the life of B, makes a lease for years by deed indented and after purchases the reversion in fee; B dieth; A shall avoid his own lease, for he may confess and avoid the lease which took effect *in point of interest* and determined by the death of B." That case is similar to the present except that there the reversion was purchased by the lessor instead of the lessee. That shows that an interest passes, and then there is no estoppel.'

[3] Langford *v.* Selmes, 3 Kay & J. 220.

such estate, make a deed purporting to grant such interest, which in the event fails to some extent from the circumstance of the grantor's own estate not being of sufficient duration to enable the grantee to take all that the deed purported to give him, — as in the illustration (supra) in Coke, Litt., if a tenant for life were to demise for a term, and then die during the term, — an actual interest would pass by the grant, and the grantee would not be estopped from showing the determination of such interest, as by the death of the grantor during the term; that is to say, admitting that the lease was for a term of so many years he would be at liberty to prove that the lessor had only a life interest, and that accordingly by his death the lease had determined. For though it was an admitted principle that the lessee could not dispute the title of his landlord, it was equally clear that where he could confess and avoid it by showing that the landlord's estate had determined, he was permitted to do so, and thus prove that the lease existed no longer. The rule was held to be the same where the interest was ab initio insufficient.[1]

[1] 'In truth,' said the learned judge, 'the question in this case is whether or not there is any reversion on which the purchaser of the ground rent would have a right to proceed for its recovery by distress or re-entry. As respects the reversion the case is in a singular position. Unquestionably a termor who grants a lease longer than his term thereby parts with his whole interest; and during the term of the original lease the tenant would hold of the owner in fee simple, who had granted the original lease; but the argument is that on the subsequent acquisition of the fee simple by the original lessee an estoppel arose, by which on the expiration of the original lease the supposed under-lessee will hold of the under-lessor who had affected to demise to him, at a rent of £6, for a term greater than he was possessed of at the date of the under-lease. There is no authority for such a proposition; and the only argument in favor of it has been that, although there is not a complete estoppel where there is an interest which might be sufficient to effect the whole object of the deed, yet where the interest was ab initio insufficient, there, in order that the deed may not lose its effect, the parties are estopped from saying that the actual interest which it purported to grant has not passed. The only authority which has been cited is Gilman *v.* Hoare, 1 Salk. 275, which was of a different character. That was a case where a person having a reversionary interest made a grant, and it was supposed from the report in 1 Salkeld that an interest there passed by way of estoppel during the first period, and out of the estate during the latter period of the demise. It appears, however, from another report of the same case, said to be in 3 Salkeld, sed qu. (and it is impossible, therefore, to treat it as an authority), that there was no interest at all because there had been no attornment in respect of the original interest of the lessor which he purported to grant, and therefore the lessor having no interest, the rule applied that a lessee cannot say that his lessor had no interest at the time of making the

The rule is stated by a writer of high authority in terms substantially these ;[1] that although it is a general rule that a lessee by indenture is estopped from alleging that the lessor had no interest in the demised premises during the joint lives of the lessor and the lessee, yet if in fact the lessor was only tenant for life the lessee may say so in answer to an action of covenant against him by the *heir* of the lessor. And the following example is given: Where covenant was brought upon a lease for years by the plaintiff as heir in reversion in fee to his father, and breach being assigned for want of repairs the defendant pleaded that the father, when he made the lease, was only tenant for life, and the father being dead, the lease had determined, and traversing the allegation of reversion in fee in the father, — the plea was held good on demurrer.[2] Upon the same principle it seems that the lessee is not estopped from showing that the lessor was seised only in right of his wife, and that she died before the covenant was broken.[3]

The principle is simply this; that while the lessor is not permitted to say that he had no estate when he executed the lease, he may say that he exhausted his interest by the lease. For example, the effect of a tenant's granting a lease of a greater interest than he possesses, or merely of his entire interest, is to make an assignment of his term ;[4] and therefore if he subsequently acquire the interest of the original owner (that is, if he now acquire the reversion), he takes the position of the reversioner. And as the lease was void against *him* for the excess above the tenant's interest, the (middle) tenant being now in

lease, and accordingly there was a perfect estoppel as between the lessor and the lessee ; and therefore there was no difficulty in that case because the true reason of the rule is that a lessee having accepted a lease cannot plead to an action by his lessor that the lessor nil habuit in tenementis. That is the principle of estoppel ; but I never heard it doubted that where a person has granted a lease exceeding in duration the actual term which he held, the effect of that would be a demise of the whole term, so that the grantee would hold of the grantor of the original term out of which the underlease was intended to be made.' But if the devisee in his declaration allege the *reversion* to belong to the lessor and heirs, the defendant must traverse it ; for to confess and avoid would be to admit the existing title in the devisee. Weld *v.* Baxter, 1 Hurl. & N. 568, in Exchequer Chamber, per Crompton, J. ; s. c. 11 Ex. 816.

[1] Sir E. V. Williams, in note to Walton *v.* Waterhouse, 3 Saund. 419.

[2] Brudnell *v.* Roberts, 2 Wils. 143.

[3] Blake *v.* Foster, 8 T. R. 487.

[4] 1 Stephens's Com. 512, 524, 7th ed.

the situation of the reversioner may avoid the lease at the expiration of his own original term.[1] But neither he nor the lessee can say that the former had no interest when the lease was granted; and if in fact the lessor had no estate at that time, he of course cannot say that the lease exhausted his right. The consequence in such a case is that if he afterwards acquire the reversion, he cannot disturb the lessee until the term of the lease shall have expired; that is, the tenant, because he took nothing by the lease, has an interest by estoppel.

It is to be observed, however, that Mr. Preston says that in *equity*, if the lessor afterwards acquire an interest sufficient to make good the lease, he may be compelled to give effect to the instrument by way of a further assurance.[2] That is (probably), he may be compelled to grant a new lease for the remainder of the term. The original lease will not itself operate even in equity upon the new interest.[3]

In regard to the tenant the rule (as we shall see hereafter) is still broader. Thus, while he cannot deny that the landlord had a title when he granted the lease, he may show that, being himself already in possession, he accepted the lease under a mistake of fact concerning the title, or through the fraud of the lessor. And the above-mentioned rules prevail as well where the lease is verbal (when not void under the Statute of Frauds) as where it is in writing under seal.[4]

§ 4. *Grantor and Grantee.*

We proceed now to the consideration of the doctrine of title by estoppel as applied to existing conveyances of land by deeds of bargain and sale, quitclaim, mortgage,[5] and the like. The general rule, as we have said,[6] is that upon the acquisition of title by the grantor of a warranty deed for value, made before title accrued, the interest is a lifeless thing in the hands of the grantor; or, according to common language, it 'inures' to

[1] See Langford v. Selmes, 3 Kay & J. 220.
[2] Abstracts, 217.
[3] Langford v. Selmes, supra.
[4] See post, chapter 14.
[5] See post, pp. 411, 412; Haney v. Ray, 54 Mich. 635.
[6] Ante, p. 384.

the grantee, giving to him a title by estoppel;[1] and the contrary if the conveyance was without warranty.[2] We shall devote the remainder of the present chapter to a minute examination of this rule.[3]

The proposition must be divided into two parts, according as it is to be applied between the grantor (and his heirs) and the grantee, and between this grantee and a subsequent grantee of the grantor to whom a conveyance of the same premises has been made after title accrued. The two cases, as we expect to show, stand upon a very different footing. First, then, upon the application, between grantor and grantee, of the above-stated rule.

To determine whether the grantee will have against the grantor a title by estoppel upon the acquisition of title by the latter — in other words, whether the grantor will be estopped from setting up the after-acquired interest against his grantee and thus from claiming the premises — will depend upon the nature of the deed. It is not always necessary that the deed should contain covenants of warranty to operate in this way; nor will it always operate in this way when it does contain such

[1] But tenant in tail in remainder cannot, apart from statute, bar the entail by warranty deed. Allen *v.* Ashley School Fund, 102 Mass. 262. The statute allowing tenant in tail in *possession* to bar the entail is another thing. See Holland *v.* Cruft, 3 Gray, 162; Whittaker *v.* Whittaker, 99 Mass. 364.

[2] Smith *v.* Williams, 44 Mich. 240; Brown *v.* Phillips, 40 Mich. 264; Boone *v.* Armstrong, 87 Ind. 168 (mortgage); Randall *v.* Lower, 98 Ind. 255, 257 (mortgage); Hannah *v.* Collins, 94 Ind. 201 (attempt to set up tax title); Dugan *v.* Follett, 100 Ill. 581; Wadhams *v.* Swan, 109 Ill. 46; Dobbins *v.* Cruger, 108 Ill. 188; Smith *v.* De Russy, 29 N. J. Eq. 407; Hart *v.* Gregg, 32 Ohio St. 502; Kelly *v.* Seward, 51 Vt. 436; Western M. Co. *v.* Peytonia Coal Co., 8 W. Va. 406. So too of an *assignment*, without warranty, of a mortgage. Weed Sewing Machine Co. *v.* Emerson, 115 Mass. 554. See Merritt *v.* Harris, 102 Mass. 326; Forster *v.* Forster, 129 Mass. 559. A grantor, notwithstanding his warranty, could probably buy in a tax title on a sale of the premises for taxes due from his grantee; but not for taxes due when he (the grantor) owned the estate. Hannah *v.* Collins, 94 Ind. 201.

[3] Quære in regard to the effect of a covenant to extend a line, or to convey, as title should subsequently be acquired, where there is no present grant beyond the title owned? See Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 692, where it seems to be admitted that there might be an estoppel. But an estoppel of the kind which is the mere deduction of a statute may, it is said in this case, be extinguished by a later statute. If, however, a right of property had really been acquired under the first statute, could the second, as matter of constitutional law, cut it off?

covenants. Besides, the deed must be voluntary; and hence a sheriff's deed will not bar the judgment debtor from claiming the land under an after-acquired title, whether the deed be with warranty or not.[1]

There is, then, in the first place a class of cases in which the grantor will be precluded from claiming his newly acquired title against his grantee though he entered into no covenants of warranty. Cases of this kind are those in which the grantor's deed contains a certain recital or affirmation, express or implied, that he is seised of a specific estate, which estate is conveyed to the grantee. The effect of such a deed, upon the principles already considered in the chapter on Recitals, will be to prevent the grantor ever after from denying that he was so seised (whatever may be the truth); and by consequence he will be estopped from saying that such estate has not passed to the grantee.[2]

This subject is illustrated by a case decided by the Supreme Court of the United States.[3] In that case the averment of the specific estate in question was not in so many words expressed, but the court gathered from the whole deed an affirmation of a particular interest, which interest the deed purported to convey. Though there were certain covenants in the deed of somewhat doubtful import, the court held that independently of these the deed bore on its face evidence that the grantors intended to convey and the grantees expected to become invested with an

[1] Emerson *v.* Sansome, 41 Cal. 552; Dougald *v.* Dougherty, 11 Ga. 578, 594; Frey *v.* Rawsour, 66 N. Car. 466. But it is of course binding in regard to the existing title. Gorham *v.* Brenon, 2 Dev. 174. See Eldridge *v.* Trustees of Schools, 111 Ill. 576, 580, holding that a deed made in obedience to an order of court is not made under coercion. Courts have no power to make an order in the sale of a decedent's estate, which will enable the purchaser to take an after-acquired title. Flemmer *v.* Travelers' Ins. Co., 89 Ind. 164. Or, it seems, of any other estate to be sold by order of court.

[2] A buyer, however, will get no more than he bargains for, though the seller may misrepresent the extent of his title. Holman *v.* Dukes, 110 Ind. 195. In the absence of anything of the kind, and of warranty, there is no estoppel against the grantor's claiming the after-acquired estate. Cuthrell *v.* Hawkins, 98 N. Car. 203. The question is of course one of intention on the face of the deed: Hannon *v.* Christopher, 34 N. J. Eq. 459. The case of Smiley *v.* Fries, 104 Ill. 416, is probably not to be taken to mean that there can be no estoppel to set up an after-acquired estate upon a recital.

[3] Van Rensselaer *v.* Kearney, 11 How. 297.

estate of a particular quality. And the bargain having proceeded upon that footing, the instrument was as binding in respect of the after-acquired interest as if a formal covenant had been made, at least so far as to estop the grantors and those claiming under them from denying that they were seised of the particular estate at the time of the conveyance.[1]

The court upon a review of the cases said that the principle deducible seemed to be that whatever the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, which estate the deed purports to convey, or (what is the same thing) if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him will be estopped ever afterwards from denying that he was so seised and possessed at the time he made the conveyance. The reason was that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him should in good faith and fair dealing be forever thereafter precluded from gainsaying it. And this principle has been applied to the conveyance (without regard to warranty) of a married woman.[2]

In cases of this kind the question whether the grantor or his heirs will be precluded from claiming the newly acquired estate will depend upon the nature of the recital or implied affirmation. If to assert the interest is not inconsistent with the recital, the grantor and those in privity with him may of course

[1] The following cases were cited: Goodtitle *v.* Bailey, 2 Cowp. 601; Bensley *v.* Burdon, 2 Sim. & S. 524; s. c. 6 Law J. Ch. 85; Right *v.* Bucknell, 2 Barn. & Ad. 278; Doe d. Marchant *v.* Errington, 8 Scott, 210; Rees *v.* Lloyd, Wightwick, 129; Bowman *v.* Taylor, 2 Ad. & E. 278; Lainson *v.* Tremere, 1 Ad. & E. 792; Stowe *v.* Wyse, 7 Conn. 214; Penrose *v.* Griffith, 4 Binn. 231; Denn *v.* Cornell, 3 Johns. Cas. 174; Carver *v.* Jackson, 4 Peters, 1. To the same effect see Root *v.* Crock, 7 Barr, 378; McCall *v.* Coover, 4 Watts & S. 151; Bachelder *v.* Lovely, 69 Maine, 33; Magruder *v.* Esmay, 35 Ohio St. 221, 231. The grantor cannot in a court of equity allege that the land was held in adverse possession by another when he conveyed. Ruffin *v.* Johnson, 5 Heisk. 604.

[2] King *v.* Rea, 56 Ind. 1. See ante, p. 340.

assert it. The estoppel will be no wider than the terms of the deed.[1]

To this class of cases must be referred certain decisions under statutes. In Missouri, for example, it is held under provisions of statute that a deed conveying the 'fee simple absolute' shall operate to bar the grantor from claiming any future interest in the premises, as well without as with warranty.[2] And similar

[1] See General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15; Heath *v.* Crealock, L. R. 10 Ch. 30; Crofts *v.* Middleton, 2 Kay & J. 194; Jacksonville R. Co. *v.* Cox, 91 Ill. 500. Release of dower is not conveyance, and the widow may of course set up a title which she has acquired since releasing. McLeery *v.* McLeery, 65 Maine, 172.

[2] Gibson *v.* Chouteau, 39 Mo. 536. In this case Holmes, J. in delivering judgment said: 'If this deed purports to convey the real estate in fee simple absolute, the after-acquired title passes under the statute, otherwise not. There is no covenant of warranty, and no estoppel by virtue of any kind of expressed warranty. The words, "bargain, sell, release, quitclaim, and convey," are words of release and quitclaim, merely. They carry the grantor's interest and estate in the land described, whatever it may be; they do not of themselves purport to do anything more; they do not even raise the statute covenants implied in the words, "grant, bargain, and sell," nor would these transmit a subsequently acquired title. Chauvin *v.* Wagner, 18 Mo. 531. There is no English authority that any other conveyance than a feoffment, fine, or lease operated by way of estoppel to pass an after-acquired title. Rawle, Covenants, 408. The land is described as being part of the tract located under a New Madrid certificate to James Y. O'Carroll, or his legal representatives, and as being the same parcel of land conveyed to Pierre Chouteau, Jr. by Robert Wash, as trustee of Joseph Hertzog, by deed recorded. The habendum is to Pierre Chouteau, Jr. and his heirs forever. This description would seem to show very clearly that neither party contemplated any other than the inchoate title created by a location under a New Madrid certificate, whatever that might be, and not a fee simple, and that the grantee already had or claimed to have that inchoate right by virtue of a deed from Hertzog's trustee, and the grantor releases, quitclaims, and conveys all his interest in the same land and title for the small consideration expressed. It is essentially a quitclaim deed, and nothing more. It makes no positive averment that the grantor is seised or possessed of any particular estate in the premises which the deed undertakes to convey and confirm. Such averments, to create an estoppel, must be positive and certain. . . . No seisin or possession of any particular estate is affirmed in the deed, either in express terms or by necessary implication, whereby an estoppel might be created. In Van Rensselaer *v.* Kearney, 11 How. 297, the deed expressly affirmed that the grantor had seisin and possession of the estate conveyed, and undertook to convey and confirm the same to the grantee. This is not a deed of that character. It falls within the general principle, which is fully recognized in that case, that a deed of this character, which purports to convey and is understood to convey nothing more than the interest or estate of which the grantor is seised or possessed at the time, does not operate to pass or bind an interest not then in existence. In French *v.* Spencer, 21 How. 228, also the deed expressly affirmed the existence of the particular

statutes in other states, as in Illinois, Arkansas, California, and Alabama have received a like construction.[1] In the last-named state it is provided by statute that the words, 'grant, bargain, and sell,' or simply 'bargain and sell,' import, in the absence of qualifying language, an express covenant to the grantee, his heirs, and assigns, that the grantor is seised of an indefeasible estate in fee simple, and for quiet enjoyment.[2]

Next, concerning the cases in which the grantor's deed contains a covenant of warranty. Whether the effect of such a

interest and estate conveyed, and empowered the grantee to make the location and receive the patent for the land when that interest should be ripened into a complete title. This is clearly not such a deed; nor does it purport to convey a fee simple absolute. To have this effect under the statute the deed must undertake to convey an indefeasible title. It must not be a quitclaim deed, merely transferring the grantor's interest, whatever it may be, but a deed which expressly undertakes to convey the land itself, and to convey it in such a manner that the grantee is not to be disturbed in his possession by any one. Bogg *v.* Shoab, 13 Mo. 365. It must contain such positive and certain averments of an absolute title in fee simple as would amount to an express warranty, if contained in a covenant of warranty, that the grantor was seised and possessed of such title to an estate, which he undertook to convey, assure, and confirm to the grantee against all the world, and would therefore create an estoppel by virtue of which the subsequently acquired title might inure to the grantee. The statute provision would seem to be the same in principle as the doctrine laid down in these decisions of the Supreme Court of the United States, proceeding upon the idea of an estoppel. It is said in Bogg *v.* Shoab that the statute extends to every deed which was obviously intended to convey and purported to convey a fee simple absolute, even without a covenant of warranty, but that it did not reach and ought not to apply to a deed where the grantor expressly guards against such an inference by inserting a special warranty against himself only and those claiming under him. The statute requires that the deed should undertake to convey a fee simple absolute. A similar statute in Illinois has received the same construction which is given to it in this state. Frink *v.* Darst, 14 Ill. 304. In Cocke *v.* Brogan, 5 Ark. 693, under a like statute the after-acquired title was held to pass by deeds which conveyed the lots *in fee simple*. This deed can have no greater force than a mere quitclaim which expressly conveys only the right, title, and interest of the grantor, as the case was in Valle *v.* Clemens, 18 Mo. 486. We conclude, therefore, that the after-acquired, inchoate, equitable title to this location did not pass and inure to the grantee under this deed, and that neither the grantee nor these defendants thereby became the legal representatives of O'Carroll, Ruddell, and Wilt, in respect to this land.'

[1] Frink *v.* Darst, 14 Ill. 304; Cocke *v.* Brogan, 5 Ark. 693; Vallejo Land Assoc. *v.* Viera, 48 Cal. 572; Chapman *v.* Abrahams, 61 Ala. 108; Stewart *v.* Anderson, 10 Ala. 504; Carter *v.* Doe, 21 Ala. 72, 91; Blakeslee *v.* Mobile Life Ins. Co., 57 Ala. 205.

[2] Jones *v.* Reese, 65 Ala. 134. For the English law see 44 & 45 Vict. ch. 41, § 19.

conveyance be to bar the grantor from claiming the after-acquired estate will depend upon the nature both of the grant and of the warranty.[1] We have already considered the cases in which the warranty operates to bar the grantor's heir, or rather descendant;[2] but the question now is when the warranty will bar even the grantor.

The effect of a *limited* warranty in a grant of 'right, title, and interest' was considered in the case of Comstock *v.* Smith,[3] which was a writ of entry. The demandants counted upon their own seisin within thirty years and a disseisin by the tenant. The tenant pleaded that before the demandants had anything in the premises, one Waters was seised thereof in fee, and that while he was so seised he (the tenant) bargained with him verbally for the purchase of the land. Afterwards the demandants, having disseised Waters unlawfully, and pretending to have a good title, granted the land in fee to the tenant with warranty; and the tenant continued for a year and upwards to hold under this deed. The tenant then, in order to get back the consideration paid, by deed 'granted, sold, and quitclaimed' to the demandants in fee all his 'right, title, claim, and demand in and unto' the premises, covenanting 'against the lawful claims and demands of all persons claiming by or under him;' whereupon Waters conveyed the premises by deed to him. The demandants replied that the tenant was estopped by his deed to set up this defence; to which on oyer of the deed there was a demurrer, which was sustained.[4]

[1] Huzzey *v.* Hefferman, 143 Mass. 232, 234; Thielen *v.* Richardson, 35 Minn. 509.

[2] Ante, pp. 389, 390. As *heir* of the grantor he is barred of course by the warranty whenever the grantor is barred. All title which the grantor acquires after the conveyance is made available to the grantee by a general warranty; and of course the heir is barred as heir. It is only when he derives title to the premises from another that he can hold them in the face of his ancestor's warranty.

[3] 13 Pick. 116.

[4] 'It is a well-settled principle of the common law,' said Mr. Justice Wilde, 'that if one conveys lands or other real estate with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee or those claiming under him any title subsequently acquired either by purchase or otherwise. Such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice as well as the policy of the law. It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it

It is held that if a party having a vested and a contingent interest in property convey by deed, with general warranty, 'all

is wise policy to repress litigation and to prevent a circuity of actions when better or equal justice may be administered in a single suit. By such a grant with general warranty nothing passes, nor indeed can possibly pass, excepting the title which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because, if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor to recover the value of the land. The principle of estoppel, therefore, not only prevents multiplicity of suits, but is sure to administer strict and exact justice; whereas if the grantee were driven to his action to recover the value of the land, exact justice might not be obtained because the land might possibly not be estimated at its just value. If, however, the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then in such case it is obvious that this species of estoppel would not be applicable. And such appears to be the law in regard to the covenant in question, by which the demandants attempt to estop the tenant to set up or plead the title of Waters. The tenant's covenant is a restricted covenant, and is coextensive with the grant or release. He agrees to warrant the title granted or released, and nothing more; that title only he undertook to assert and defend. To extend the covenant further would be to reject or do away the restrictive words of it, and to enlarge it to a general covenant of warranty against the manifest intention of the parties. . . . Now if Waters after the tenant's quitclaim deed had evicted the demandants, this would have been no breach of the tenant's covenant. Or if the tenant now held under Waters without having obtained the fee from him, he might pray Waters in aid, and thus defend himself against the title of the demandants; the title of Waters being, as the plea avers, the elder and better title; and this would also be no breach of the tenant's covenant. He did not undertake to convey to the demandants an indefeasible estate but only his own title, nor did he agree to warrant and defend it against all claims and demands but only against those derived from himself; by which he must be understood to refer to existing claims or encumbrances, and not to any title which he might afterwards acquire by purchase or otherwise from a stranger. (Ellis *v.* Welch, 6 Mass. 246, 250). . . . It was then contended by the demandants' counsel that, admitting the tenant is not estopped by his covenant of warranty, he is nevertheless estopped by his conveyance to deny that he had any title in the land at the time of the conveyance. This also is a well-established principle of the common law. Coke, Litt. 45, 47; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Bull, 1 Johns. Cas. 81. But the tenant in his plea does not deny that he had any title to the land; on the contrary, he avers that before the time of his conveyance he was in possession of the land under Waters, that afterwards the demandants disseised Waters, and being seised by disseisin they conveyed to the tenant all their right and title with a covenant of warranty similar to the one contained in his reconveyance to them. The demandants in their turn would be estopped to aver that they had no title in the land, nor is there any such averment in the pleadings. The tenant at the time of his reconveyance might have had a valuable interest in the land by possession and improvements although Waters had a paramount title. This interest, whatever it was, passed to the demandants by the tenant's deed; and it was all the title he had to convey or was expected to convey. If under these circumstances the demandants could

his right, title, and interest' therein, the deed passes only his vested interest; and he will not be estopped to claim an after-acquired interest in the property.[1] In the case first cited one Soley conveyed by the words quoted one eighth of an estate devised to him by his grandfather, one half of which devise was a contingent remainder; and it was contended that, though this last-named interest did not pass by the deed, still that when the estate afterwards became vested, the deed operated by way of estoppel. The court, however, was of a different opinion. Chief Justice Shaw said that the deeds did not contain anything which prevented the petitioner from asserting his title to the contingent interest. The indenture which had been most relied upon contained no stipulation or averment that the petitioner's share and property were of any particular proportion. It was manifest that the conveyance was fully satisfied by applying it to the vested interest. No allegation or averment was falsified by a denial of the claim to the land in controversy, because there was no averment of the nature or extent of the right, title, and interest under the grandfather's will. Nor did it make the case different that there was a covenant of warranty; for this was simply equivalent to a warranty of the estate he then held, and was to be confined to the estate then vested.[2]

Indeed, it is settled in Massachusetts, Maine, and elsewhere that the covenant of warranty in a quitclaim deed of the grantor's right, title, and interest will be limited in effect to such estate as the grantor then had, however the covenant may be expressed.[3] Thus in Hoxie *v.* Finney, a deed of this kind con-

now acquire without any consideration another title by estoppel, we should be compelled to admit that estoppels are as odious as they are sometimes said to be. But the doctrine of estoppel aids much in the administration of justice; it becomes odious only when misunderstood and misapplied.'

[1] Blanchard *v.* Brooks, 12 Pick. 47; McBridge *v.* Greenwood, 11 Ga. 379; Graham *v.* Graham, 55 Ind. 23; Nicholson *v.* Caress, 45 Ind. 479; Hanrick *v.* Patrick, 119 U. S. 156, 175; Rawle, Covenants, 393, 4th ed. See Avery *v.* Akins, 74 Ind. 283, 291. It is held that the effect of a warranty will descend upon subsequent remote grantors, though they may convey only their right, title, and interest, so as to bar them from setting up after-acquired titles against their grantees. 'Covenants of warranty may descend through the operation of deeds that are mere naked releases indefinitely from party to party.' Powers *v.* Patten, 71 Maine, 583; Wilson *v.* Widenham, 51 Maine, 566; Brown *v.* Staples, 28 Maine, 497.

[2] Brown *v.* Jackson, 3 Wheat. 449.

[3] Hoxie *v.* Finney, 16 Gray, 332; Doane *v.* Willcutt, 5 Gray, 328; San-

tained a covenant that the grantor was lawfully seised *in fee* of the premises, that they were free from all encumbrance, that he had good right to sell and convey the same, and that he would warrant and defend them to the grantee, his heirs and assigns, against the lawful claims and demands of all persons. And yet it was held that the covenant was not broken by an eviction of the grantee under an encumbrance created by the grantor before making the conveyance. The covenants were held to be governed by the granting part of the conveyance, 'all my right, title, and interest.' It would follow in accordance with the doctrine of Comstock *v.* Smith, above referred to, that the grantor could recover the premises from his grantee under a title acquired from another which was in existence when the deed was executed.

In other states, however, the use of such general covenant of warranty operates as effectually by way of rebutter as it does in a conveyance of the fee simple.[1] Jones *v.* King was a case in point. The grant was of 'all right, title, interest, and claim; and the covenant read as follows: 'And the said James A. King and William King, for themselves and their heirs, do by these presents covenant to and with the said Thomas C. King that they will forever warrant and defend the title to the said tract of land or lot of ground, to be free from the claim or claims of himself and his heirs, and all other persons claiming by, through, or under him, and also from the claim or claims of *all and every other person or persons whomsoever.*' Mr. Justice Breese, speaking for the court, said that it was a well-settled principle of the common law that if one conveys lands or other real estate with a covenant of general warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee therein or those claiming under him any title he himself may subse-

ford *v.* Sanford, 135 Mass. 314; Allen *v.* Holton, 20 Pick. 458; Blanchard *v.* Brooks, 12 Pick. 47; Sweet *v.* Brown, 12 Met. 175; Hanrick *v.* Patrick, 119 U. S. 156, 175; Kinnear *v.* Lowell, 34 Maine, 299; Locke *v.* White, 89 Ind. 492; Shumaker *v.* Johnson, 35 Ind. 33; White *v.* Brocaw, 14 Ohio St. 339; Holbrook *v.* Debo, 99 Ill. 372. See Merritt *v.* Harris, 102 Mass. 326; Russ *v.* Alpaugh, 118 Mass. 369.

[1] Jones *v.* King, 25 Ill. 383; Mills *v.* Catlin, 22 Vt. 98; Steiner *v.* Baughman, 12 Penn. St. 106. See Calvert *v.* Sebright, 15 Beav. 156.

quently acquire from another by purchase or otherwise. Such new title would inure by way of estoppel to the use and benefit of his grantee, his heirs and assigns; it was not just that a party should be permitted to hold or recover an estate in violation of his own covenant.

In this connection grants with general warranty made by trustees, executors, and administrators, without authority, on behalf of the cestuis que trust or heirs, may be referred to. The warranty being unauthorized by the person intended, the law treats it as the undertaking of the trustee, executor, or administrator himself; and it follows upon the principle of rebutter that such person and his privies will, if the grant was general, be precluded from claiming against the grantee and his privies any estate which such trustee, executor, or administrator may happen to acquire in the premises conveyed.[1]

It is also laid down in Massachusetts that qualified covenants against the lawful claims and demands of all persons claiming by or under the grantor, in a quitclaim deed reserving a right of way for a certain purpose, do not estop the grantor from claiming a right to enjoy the way for some other purpose than that mentioned if the way has been laid out and accepted by the public authorities.[2] Nor does a covenant of warranty estop the grantor to claim a way of necessity over the land granted.[3] Upon these propositions the courts would probably all be agreed.

In another case[4] involving the construction in a deed of partition of a similar warranty to that in Flagg *v.* Flagg Mr. Chief Justice Shaw said that a covenant that the grantee should hold free from all right, title, interest, or claim of the grantor could not have greater force than a direct covenant of seisin, which was not broken by the existence of an outstanding paramount title. It did not estop the plaintiff from showing that at the time of the partition a third party held the superior title, which the plaintiff had since acquired and now relied upon.[5] This also would probably be everywhere accepted law.

[1] Prouty *v.* Mather, 49 Vt. 415.
[2] Flagg *v.* Flagg, 16 Gray, 175.
[3] Brigham *v.* Smith, 4 Gray, 297.
[4] Doane *v.* Willcutt, 5 Gray, 328.
[5] See also Wight *v.* Shaw, 5 Cush. 56; Miller *v.* Ewing, 6 Cush. 34; Smith

In a recent case in Maine[1] the plaintiff brought an action for dower. It appeared that her husband had conveyed the premises to one Joab Harriman by a deed to which the plaintiff was not a party. Joab quitclaimed the premises to one under whom the defendant by sundry mesne conveyances claimed. This deed of quitclaim contained no covenants of warranty, but closed in these words: 'So that neither I, the said Joab Harriman, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises or their appurtenances, or any part or parcel thereof forever.' The defendant claimed that the plaintiff had barred her right to dower by a deed of release made to Joab Harriman *subsequently* to his quitclaim of the premises. But the court ruled that this was no bar.[2] The propriety of such a construction has, however, been very properly doubted.[3] A similar covenant in Trull *v.* Eastman[4] was regarded as a covenant real, operating by way of rebutter against the future claims of the grantor, his heirs and assigns.[5] A widow's covenant against all encumbrances, in a mortgage of real estate by her, has been held, it may be added, to estop her to set up a claim of dower in the premises.[6]

A deed of land through which a stream runs, though it contain the usual covenants of warranty, does not estop the grantor from subsequently erecting a dam below the land, and thereby flooding it under the protection of mill statutes, in the same manner as if the proprietor had derived his title from some other

v. Strong, 14 Pick. 128; Stearns *v.* Hendersass, 9 Cush. 497.

[1] Harriman *v.* Gray, 49 Maine, 537.

[2] 'As between the demandant and Joab Harriman,' Appleton, J. remarked, 'she would be estopped. But the release to Joab does not inure to his grantees, and not inuring by estoppel to their benefit, they cannot set it up as a bar. It has been repeatedly settled that a grantee is not estopped from setting up a subsequent title by language such as is found in the deed of Joab to James Harriman. Nor do the subsequently acquired rights of Joab inure to the use of the grantee.' Pike *v.* Galvin, 29 Maine, 183.

[3] Rawle, Covenants, 414, 415, where it is said that Pike *v.* Galvin, and the subsequent case of Loomis *v.* Pingree, 43 Maine, 299, 314, have not elsewhere been followed.

[4] 3 Met. 121.

[5] See also Miller *v.* Ewing, 6 Cush. 34; Jackson *v.* Bradford, 4 Wend. 619.

[6] Hoppin *v.* Hoppin, 96 Ill. 265.

source.[1] And of course if a certain portion of a tract of land is reserved by the grantor, the covenants of warranty cannot prevent him from asserting his right thereto whether under a present or an after-acquired title.[2]

If the covenants should become extinguished, they can have no effect, it is plain, upon after-acquired interests. In a recent case[3] the plaintiff brought ejectment under the following circumstances: The land had been conveyed by A to B with warranty; B conveyed to C; and C then conveyed it back to the first grantor, A. The plaintiff took a conveyance of the land from B, after he had conveyed to C; and in a suit against A he now claimed that A's after-acquired title inured to him by reason of the covenants in the first deed by A to B. But the court ruled otherwise. The fact that the plaintiff claimed through divers mesne conveyances from the defendant, who had conveyed with warranty, and the further fact that the defendant had again acquired the title, did not affect the case, and constituted no estoppel against the defendant. The covenants, which passed to C, had been extinguished by the conveyance of the land from C back to the defendant. The plaintiff having taken a deed from an intermediate grantee after he had parted with his title was not in a position to set up an estoppel.

This doctrine respecting after-acquired estates applies, when the grant and warranty are sufficient, though the original conveyance was fraudulent and invalid against creditors.[4] The case cited was an action of trespass to land; the plaintiff having conveyed his life interest in trust for the benefit of his wife by deed of quitclaim with special warranty against all claims of the grantor or his heirs, or of any other person claiming under him or them. The deed was fraudulent and invalid, the grantor having been insolvent at the time. Subsequently having taken the benefit of the insolvency law, he became the purchaser of the assignee's interest in the land, and received a conveyance. The court held that this new title vested in his grantee, and

[1] Dean *v.* Colt, 99 Mass. 486.

[2] Gill *v.* Grand Tower Co., 92 Ill. 249.

[3] Goodel *v.* Bennett, 22 Wis. 565. The Bankruptcy Act of 1841 did not extinguish covenants of warranty in a deed. Bush *v.* Cooper, 18 How. 82.

[4] Gibbs *v.* Thayer, 6 Cush. 30.

that the action could not be sustained. Chief Justice Shaw said that the covenant in the original deed differed from a general warranty in this, that one was a warranty against any and all paramount title, while the other was against the grantor himself and all persons claiming under him.[1] In the present case the plaintiff was claiming the very same title which he had conveyed with warranty; and it was quite distinguishable from the case where the grantor subsequently purchased another estate. It was immaterial, he said, whether or not the original conveyance was fraudulent against creditors. If it was not, then the property did not pass to the assignee, and the plaintiff took no title under it; if it was fraudulent, it was by reason of acts done by him, which had given rights to creditors to reclaim the land and hold it, and was an encumbrance against which he had warranted. In this case the purchase of the interest was only an extinguishment of an encumbrance; and by the doctrine of estoppel this purchase of the outstanding right of creditors inured to the benefit of the plaintiff's grantee.

Improvements erected by the grantor in possession also inure to the benefit of the grantee.[2] The case cited was an action to recover possession of certain improvements on property in the hands of a tenant of the owner, by virtue of an attachment and execution against the latter. The owner had prior to the attachment mortgaged the property to a third person, and had then erected the improvements in question. The court held that the action could not be maintained; the ground taken being that the owner by his mortgage would be estopped in a contest between him and his grantee from asserting a title to the property, by the covenants in the deed.

Covenants for quiet enjoyment in themselves are held to be as effective by way of estoppel as words of conveyance.[3] The

[1] Newcomb *v.* Presbrey, 8 Met. 406.

[2] Humphreys *v.* Newman, 51 Maine, 40.

[3] Long Island R. Co. *v.* Conklin, 29 N. Y. 572; Goodtitle *v.* Bailey, 2 Cowp. 597; Smith *v.* Williams, 44 Mich. 240. Some authorities hold that in regard to the acts of strangers the covenant for quiet enjoyment upon an agreement for a lease in the future extends only to the time when possession is to be taken. Hertzberg *v.* Beisenback, 64 Texas, 262; King *v.* Reynolds, 67 Ala. 233. In New York the remedy is against the party interfering with the lessee's right of possession. Gardner *v.* Keteltas, 3 Hill,

doctrine seems to rest upon the same grounds as that concerning the estoppel of a grantor in fee with warranty to set up an outstanding title against his grantee, namely, that of the prevention of circuity of action. Should the grantor, having acquired a paramount title, attempt to disturb and regain the possession of his grantee, the latter would be entitled to set up the covenant for quiet possession by way of rebutter; and this, it would seem, would as effectually operate against the grantor as if he had made a direct conveyance of the land. Indeed, whatever the form of the covenant of assurance, if a grantor obligate himself to protect his grantee in the estate which he assumes to convey, he will be estopped to set up an after-acquired title against him and turn him round to a suit upon the covenants.[1]

It is important to notice the distinction between covenants of seisin and against encumbrances, and the covenants for further assurance and of warranty.[2] The distinction was clearly presented in the case of Chauvin *v.* Wagner.[3] In this case Chauvin and wife joined in a conveyance of the wife's land by a deed which the court held ineffectual to convey her estate by reason of a defective certificate of acknowledgment. This deed contained statutory covenants of seisin, against encumbrances, and for further assurance. The plaintiffs, who were heirs of the grantor their father, but without assets from him equal to the value of the property conveyed, now brought ejectment to recover it of the defendants, who claimed under the conveyance mentioned. The court held that the plaintiffs were not estopped by the covenants.[4]

330. But see Coe *v.* Clay, 5 Bing. 440, and the two cases just cited.

[1] Smith *v.* Williams, 44 Mich. 240.

[2] Chauvin *v.* Wagner, 18 Mo. 531. See Heath *v.* Crealock, L. R. 10 Ch. 30; General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15.

[3] 18 Mo. 531.

[4] Mr. Justice Gamble, who delivered the opinion, said that but one of the statutory covenants in the deed in question ran with the land, which was the covenant for further assurance. Collier *v.* Gamble, 10 Mo. 467. 'The others,' he proceeded to say, 'are broken as soon as made if in the one case there is not an indefeasible seisin or in the other there is an encumbrance. A right of action exists in either case upon the appropriate covenant, on the execution of the deed; but the damages to be recovered may be enhanced by subsequent events. A recovery of land by title paramount is not the breach of the covenant but evidence of the extent to which the grantee is

There remain to be mentioned certain cases of implied warranty having a similar operation. In the case of a partition of

damnified by the breach, which existed as soon as the covenant was made. Mosely *v.* Hunter, 15 Mo. 328. The liability on the covenants, arising as soon as the covenants were made, would bind the heirs of the grantor, having assets by descent, in just the same manner that they would have been bound by a bond for the payment of money in which he bound his heirs. The covenants are not connected with nor do they run with the land. These covenants do not operate as the ancient covenant of warranty to transmit a subsequently acquired title to the covenantee, nor do they operate as a rebutter against the grantor in respect to their obligation as covenants. In some cases recitals and admissions contained in deeds are held to estop the grantor and those claiming under him from asserting a title to the land conveyed when such assertion of title would be contrary to the recital or admission made in the deed. Goodtitle *v.* Bailey, 2 Cowp. 597; Carver *v.* Astor, 4 Peters, 86; Kinsman *v.* Loomis, 11 Ohio, 478; Root *v.* Crock, 7 Barr, 380; Stowe *v.* Wyse, 7 Conn. 214. The principle in these and similar cases would warrant the decision that the covenants contained in the words, "grant, bargain, and sell," and which are to be regarded as if written out in the deed, should as an assertion of present seisin in the grantor estop him and those claiming under him from asserting a title at the time of making the conveyance. . . . If the plaintiffs are not estopped by the covenants of seisin or against encumbrances, are they affected by the covenant for further assurance? This covenant runs with the land. If Francis D. Chauvin, the ancestor, had acquired a further or better title to the premises after his conveyance, he would have been compelled specifically to execute the covenant by conveying such title. 2 Sugden, Vendors, 541; 2 Ch. Cas. 212; Smith *v.* Baker, 1 Younge & C. Ch. 223. If he had acquired a title subsequently to his conveyance and such title had descended to his heirs, they would have been compelled to execute the covenant. The present plaintiffs have never acquired any title to the property from their father. In respect to it there is no privity between them and their father. It was acquired fourteen years after his death. They are responsible as his heirs upon his covenants as far as they have assets by descent from him. And if in the present case it were shown that the assets by descent were equal to the value of the property when they acquired the title, their obligation then as heirs, in respect to the assets descended, might have been held complete to make the assurance.' [See Rector *v.* Waugh, 17 Mo. 13; Dean *v.* Doe, 8 Ind. 475; 2 Smith's L. C. 742, 6th Am. ed. For the early common-law rule see Jourdan *v.* Jourdan, 9 Serg. & R. 268.] The duty to make an assurance could not devolve on them while the title was in their mother. The covenant provided by the statute, if written in the deed in the form expressed in the act, would simply contain a stipulation "for further assurance thereof to be made by the bargainor, his heirs and assigns." The heirs of the grantor, as such, are bound to make assurance, but certainly not until there is something to be done by which the grantee's title can be secured. But nothing could be done by them until the title came to them by descent from their mother, and they could not be held to convey it then unless they had assets of equal value from their father. No such fact has been shown in the case. If the plaintiffs are to be held bound to make assurance because of equal assets descended from the father, it must be shown by the defendants.'

Sealed articles of agreement for the conveyance of land, it may be observed,

lands by writ between co-tenants the law imports a warranty of the common title, and holds it incompatible with their duty to each other for either to become demandant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co-tenants and their common warrantor.[1] The rule, it is said, does not apply to the case of partition in pais, by conveyance between the parties; in that case there appears to be no estoppel, apart from recitals, unless there is an express warranty.[2] And the rule itself has been subjected to some qualification.

In a case in Ohio a question arose of the effect of a partition between co-devisees upon a then inchoate right of dower in one of them, which subsequently became perfect.[3] The facts in the case cited were these: The plaintiff was the widow of Joseph Walker, and the daughter of Josiah Hedges, and also sister of the defendant. During her coverture her husband had been seised in fee of the premises in which she now claimed dower. The land was conveyed to Hedges her father without any release of dower. He died leaving this and other land to his children; they made partition of the property, and the land in controversy was assigned to the defendant. It was held that the rule of estoppel did not apply, because the title which had ripened in favor of the demandant was at the time of the partition inchoate and incapable of being asserted.[4]

do not amount to a covenant for further assurance, and do not estop the obligor from claiming the land. Anonymous, 1 Hayw. 331.

[1] Rountree *v.* Denson, 59 Wis. 522; Weiser *v.* Weiser, 5 Watts, 279; 1 Washburn, Real Prop. 431, 432; 2 Black. Com. 300.

[2] Rountree *v.* Denson, 59 Wis. 522; Weiser *v.* Weiser, 5 Watts, 279. Where the grant is in fee with general warranty, the co-tenant grantee will have the benefit of the estoppel against his late associate, the grantor, should he attempt to set up an after-acquired title. Rountree *v.* Denson, 59 Wis. 522. Contra, if the warranty is qualified so as to extend only to present interests. Doane *v.* Willcutt, 5 Gray, 328; s. c. 16 Gray, 368.

[3] Walker *v.* Hall, 15 Ohio St. 355.

[4] Mr. Chief Justice Brinkerhoff, speaking for the court, said: 'Is the plaintiff precluded from asserting her claim to dower in a portion of the lands partitioned among her and her co-devisees by the mutual warranty which the law implies as arising and subsisting inter se between parties to a partition so long as the privity of estate continues between them? This is a serious question, and one not free from difficulty. That such warranty as a general rule exists at common law, is clear from the old books. "If the purparty of one parcener be evicted by a

The case of a mortgage given back by the purchaser to the vendor of an estate stands upon a footing of its own. While

title paramount the partition shall be defeated; for the partition *imports a warranty* and condition in law that the one shall enter upon the other and enjoy her part in parceny, if she be evicted, as long as the privity between them continues." Comyns's Dig. "Parcener," C, 13; Coke, Litt. 173 b and 174 a. "Applying this common-law duty of co-tenants to aid each other in protecting what had been a common estate even after partition made, the law holds it incompatible with their duty towards each other for either to become the demandant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co-tenants and their common warrantor." "And where partition has been made by law, each partitioner becomes a warrantor to all the others to the extent of his share so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition made can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been partitioned off to him." 1 Washburn, Real Prop. 431, 432; Venable *v.* Beauchamp, 3 Dana, 321; Feather *v.* Strohoecker, 3 Penn. 505; Jones *v.* Stanton, 11 Mo. 433. That these are the established general rules bearing upon the question under consideration must be admitted; and it is equally clear that when they are applied to the ordinary case of the acquisition by purchase of an independent, adverse, and paramount title by one co-tenant, and its assertion by him against another after partition, the operation of these rules is equitable and just. In such case it is but just that the purchaser of the adverse title should be held to have purchased for the common benefit of all parties to the prior partition, and that his rights under such purchase should be limited to a claim for contribution against his late co-tenants to reimburse him for his expenditure for the common benefit. 4 Kent, Com. 371, notes. And except the case of Woodbridge *v.* Banning, 14 Ohio St. 328, I have not been able to find a case in which any exception to the application of these general rules has been recognized. But the cases in which the doctrine of implied warranty between partitioners has been invoked and applied are few; and all of them present the simple case of a voluntary purchase (after partition made, and before eviction by adverse paramount title) of an adverse and paramount title, and the attempt to assert such title against co-partitioners. But this is not such a case. As in Woodbridge *v.* Banning, supra, this is a case in which by the operation of law and the act of God there has subsequent to the partition ripened in favor of the demandant a title which potentially existed in her at the time of the partition, but which was then inchoate and incapable of being asserted. In none of the other cases were the facts analogous to the facts in this; and the question as to whether the common-law doctrines of implied warranty between co-partitioners apply to a case of this kind did not in them arise. Moreover, it seems to me to be not unworthy of notice that the doctrines of implied warranty and consequent estoppel between co-partitioners originated at common law; and though based on considerations of natural equity they were long applied only in proceedings at common law by writ of partition. That form of proceeding is now obsolete, and has never had a place in the practice of our courts; it being superseded by proceedings in equity and under special statutes. And it seems to us that when the principles of the common law are as here invoked as guides to proceedings in equity, they ought to

it is true that where money is loaned, or something equivalent done, upon the security of a mortgage in fee with general warranty, the mortgagor cannot set up an after-acquired estate against the (unsatisfied) mortgagee;[1] it is equally true that where the transaction is simply a purchase, with such mortgage back to secure payment of the purchase-money, the rule does not apply.[2] In Randall *v.* Lower the court well declared that a mortgagee who had with warranty granted the property to the mortgagor, and yet had no title at the time, had broken his own covenant,[3] and by his own act in assuming to grant what he did not own lessened the estate which his grantee mortgaged back to him. It was not good faith in the grantor to grasp for after-acquired property, when he himself had assumed to convey all the title which his mortgagor undertook to mortgage back; it was enough that the grantor got back what he had conveyed. That too was all that could in reason be considered to have been the intention

be applied only so far as the ends of justice will allow. The warranty under consideration is not a warranty in fact, but a warranty by implication of law only. The law raises the implication for the attainment of justice; and the implication should cease whenever its application will work injustice. To hold Mrs. Walker estopped to claim dower in this case by reason of an implied warranty would be unjust to her; but to award it to her in accordance with the provisions of our statute in respect to improvements made subsequent to alienation by the husband, and decreeing contribution by all the co-partitioners to recompense Mrs. Hall for the loss of her equal proportion of the estate exclusive of the dower estate of Mrs. Walker will do justice to all. . . . The case of Woodbridge *v.* Banning, before referred to, was closely analogous to this. There a partition was had between parties as heirs of Anthony Banning, deceased. Subsequently a spoliated will of the common ancestor was established and admitted to probate. And in an action by a devisee under the will who had been a party to the proceeding in partition, to recover lands which the partition had assigned to other parties, he was held not to be estopped by the proceedings in partition. I think I am not mistaken in saying, however, that in that case the common-law doctrine of implied warranty between co-partitioners escaped the attention of the court. Had it been otherwise, the reasons given for the decision would probably have been modified; but the decision would have been the same.'

[1] Randall *v.* Lower, 98 Ind. 255; Boone *v.* Armstrong, 87 Ind. 168.

[2] Randall *v.* Lower, supra; Brown *v.* Phillips, 40 Mich. 264; Haynes *v.* Stevens, 11 N. H. 28; Smith *v.* Connell, 32 Maine, 123. The case of Hitchcock *v.* Fortier, 65 Ill. 239, contra, is not well considered, and is denied in Randall *v.* Lower.

[3] And the purchaser could sue therefor notwithstanding the covenants of his mortgage. Ibid.; Hubbard *v.* Norton, 10 Conn. 422; Connor *v.* Eddy, 25 Mo. 72; Lot *v.* Thomas, 2 N. J. 407; Sumner *v.* Barnard, 12 Met. 459; Haynes *v.* Stevens, 11 N. H. 28; ante, p. 359.

in the grant of an estate momentarily to the purchaser, and directly reconveyed. The authorities indicate some divergence in regard to the ground of the rule,[1] but the rule itself is clear.

§ 5. *Grantee before and Grantee after Title acquired.*[2]

We proceed to the case of a contest between a grantee before title acquired and a grantee afterwards, who had no notice of the prior conveyance. And it now becomes necessary to ascertain more precisely than heretofore the nature of a title by estoppel under existing modes of conveyance. Does the after-acquired estate actually pass to the grantee as soon as the grantor acquires it, or is the grantor only precluded from setting it up? And if the latter is the true view, does the estoppel fall upon the assigns of the grantor without notice, as well as upon the heirs?[3] The answer to the first question has been anticipated already, in the statement that estoppel is not conveyance.[4]

[1] See Randall *v.* Lower, 98 Ind. 255, 260.

[2] The author published the substance of the following pages in the American Law Review for January, 1875. The discussion, to be fully understood, should be read entire.

[3] There are pernicious statutes of recent date in not a few of the states, which make the estoppel act as a conveyance, not saving the rights of purchasers for value without notice, after title acquired. See Rawle, Covenants, § 248, note, 5th ed. Even between grantor and grantee the doctrine that the estoppel is a conveyance is pernicious, for it cuts off, if the expression means anything, the right of action by the grantee upon the covenants, if he fails to sue before the grantor acquires a title; and acquiring a title after suit would defeat an action well begun.

The statute of Kansas may be quoted as an example of what at first might seem to be a very innocent and proper, if unskilful, piece of legislation, and of course it is not likely that any harm was *intended* by it: 'Where a grantor by the terms of his deed undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not, at the time of such conveyance, have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately *pass* to the grantee, and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance.' Comp. Laws, 1879, c. 22, § 5, p. 211.

If the statute is to stand in this form, clauses should be added saving the rights of purchasers for value without notice after the title was acquired, and also of grantees who may have sued for breach of warranty or for fraud; and it should be restricted, inter partes also, to purchasers for value. But the better course by far would be to strike out the words, 'immediately pass to,' and substitute for them the words, 'shall not be available against,' or 'shall not be alleged against,' and then restrict the act to purchasers for value.

[4] Ante, p. 385.

But that remains to be shown; and the answer to the second question must also be specially given. The whole subject should be considered first, as it stood before the Statute of Uses, and secondly, as it has been modified by that statute.

At common law (that is, before the Statute of Uses) there were three assurances which operated to pass future interests to which the alienor had at the time no title, — the feoffment, the fine, and the common recovery, — to which a fourth, the lease, may be added as possessing a similar efficacy.

The feoffment was the conveyance by which the lord of a manor parcelled out his lands to his vassals in consideration of fealty and service; and as the vassal promised allegiance for life, the donor in the earliest times gave to him a life estate, and in later times a fee. The feoffment created in all cases a life estate at least, — by right if the feoffor owned an estate in the lands equal to that conveyed; by wrong if he did not. In the latter case all estates, whether in expectancy or possession, which stood in the way of a gift of the freehold were displaced;[1] and in most cases the parties injured lost their right of entry, and were driven to an action at law.

This was by force of the seisin and possession of the feoffor. Seisin always gave an estate of freehold whether the party was in by right or by wrong; and it followed that by the delivery of it (which of course required possession) an estate for life or in fee passed to the donee. If the donor had not a sufficient estate in himself to effect the object by right at the time of the conveyance, and should afterwards acquire the requisite interest, he was barred from setting it up against his feoffee. The feoffment 'passeth the present estate of the feoffor, and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed.'[2]

There was no way in which the feoffor could avail himself of an after-acquired title except by disseising his feoffee. He had of course no right of entry in pais, for the interest acquired was necessary to make out the freehold which the livery of seisin had conveyed; and he could not bring a writ of entry, for the feoffee would set up the feoffment as an estoppel. He could

[1] Touchstone, 203; ante, p. 385. [2] Touchstone, 204.

not convey by release, fine, or recovery, for these assurances also required a possession; and he could not alien the new interest by grant or bargain and sale, for these conveyances when used to convey present interests were, as we shall see, void at law in all cases, and ineffectual even in equity without possession. 'He cannot purchase the fee,' says Mr. Preston, 'since his feoffment is a disseisin' of the owner.[1] That is, since the owner has been put out of possession, he cannot alien to one not in possession. Even a release of the new interest to any one but the tenant in possession would be void.[2]

Such was what is often called 'the high and transcendent effect' of an estoppel at the common law; in point of fact it appears to be nothing more than the transcendent effect of a delivery of the donor's seisin in the gift of a fief. He who technically *disseised* another acquired for all purposes, so long as he retained uncontested possession, an estate of freehold; and the disseisee though having still the right of property could make no use of it until the disseisin was terminated, except by way of release to the party in possession. Now, this estate of freehold was as effectually passed by livery of seisin as it was acquired by disseisin; and for the feoffor to set up an after-acquired interest against his feoffee would be repugnant to the estate conveyed, as much so as if his conveyance had been rightful. But this effect of the conveyance has been commonly called an estoppel. Among the acts giving rise to an estoppel in pais (and in early times the feoffment was an act in pais) Coke mentions *livery*, entry, etc.; these being acts of a notorious character having the like conclusive effect of a deed.[3]

From this it appears that the estoppel upon the feoffor arose from the very nature of the conveyance. But there was another important function of the feoffment arising either from an express warranty, or, in the absence of such, from the operative word 'dedi,' which should be distinguished from the estoppel. The word 'dedi' implied a warranty on the part of the feoffor (and before the Statute of Quia Emptores, of his heirs) that the vassal should be protected in his estate; but this as well as an

[1] 2 Preston's Abstracts, p. 211.
[2] Coke, Litt. 270 a.
[3] Coke, Litt. 352 a.

express warranty was usually something different from the estoppel. The estoppel was merely the effect of the livery, operating actually to pass after-acquired interests; the implied warranty arising from dedi, like an express warranty, was probably most generally used either as a voucher against the feoffor when the lands were demanded by another, or as ground for a writ of warrantia chartæ, in either of which ways the feoffor could be called upon to give to the feoffee other lands of equal value in case of a recovery by the demandant.[1] But it seems that the warranty could also be used as a rebutter against the feoffor should he attempt to regain the lands. 'If the warrantor,' says Coke, 'should implead the warrantee, the latter (the tenant) might show the warranty and demand judgment whether contrary to the warranty the warrantor should be suffered to demand the thing warranted; and this was called a rebutter.'[2]

This use of the warranty directly against the warrantor was probably seldom called into requisition; for it would not often happen that the lord would endeavor to regain possession in this way, knowing how vain (when he could not overawe the court) would be the attempt to enter an action at law against his tenant in the face of his own solemn conveyance. If dissatisfied with his tenant, he would be more likely to resort to the rough but effective method of the times, an eviction vi et armis. But if the warranty was ever in fact used as a rebutter against the feoffor, it would seem to have been merely equivalent to setting up the conveyance against him and relying upon the livery of seisin. The word (dedi) relied upon as creating the *implied* warranty certainly possessed no inherent potency, as appears from the fact that in other kinds of alienation, as in the grant and bargain and sale where the words 'dedi et concessi' are also the operative terms, 'dedi' has never imported a warranty. Indeed, the only reason why it was deemed necessary to fix a warranty inseparably upon the particular gift containing the words 'dedi et concessi' was because that gift was the gift of a fief, and without the fief the relation which was entered

[1] Touchstone, 181, note; 2 Black. Com. 300.
[2] Coke, Litt. 265 a; Touchstone, 182.

into between feoffor and feoffee, that of lord and vassal, could not endure. When, therefore, feoffors bethought themselves, by omitting a clause of warranty, to escape the consequences of a disseisin of the feoffees, Parliament took action of a special nature, applicable only to the feoffment, and established the implied warranty under consideration.[1]

It follows that the passing of future interests to the feoffee did not arise by force of the warranty unless that term, when used in a contest between the feoffor and the feoffee, was simply an expression of the effect of the livery. We apprehend that, if ever used in *such* cases where the contest related to the passing to the feoffee of after-acquired interests, this was the extent of its signification; that it expressed nothing of itself, and that its use was unnecessary. To say, then, that future interests passed by force of the warranty is only to say that they passed by force of the livery of seisin. If this is true, no argument can be based upon the operation of the feoffment warranty to show the effect of a warranty in our modern conveyances.[2]

The fine also had the effect of passing future interests.[3] The highest form of it (sur cognizance de droit come ceo) was indeed only an acknowledgment of record of a feoffment made; though it did not in all respects possess the efficacy of a feoffment.[4] But the form of fine above mentioned had in some particulars even greater potency than the actual livery of seisin, of which it was an admission by the tenant; for it was always levied with proclamations,[5] and from this circumstance bound not only parties and privies, but strangers also, if they failed to put in their claims within the time allowed by law. It was in reference to this property of a fine that rights were said to be barred by fine and non-claim.[6] This particular fine also operated to bar estates

[1] St. de bigamis, 4 Edw. 1, c. 6 (A. D. 1276). Writers from Coke down have spoken of this statute as though the warranty was raised by reason of the words, 'dedi et concessi.' These words are merely descriptive of the conveyance intended, to wit, a feoffment. The warranty was annexed because a fief was given.

[2] See also the consideration of the common-law warranty in 2 Smith's L. C. 731, 6th Am. ed.

[3] Doe d. Christmas *v.* Oliver, 10 Barn. & C. 181; Weale *v.* Lower, Pollexf. 66.

[4] See Touchstone, 203.

[5] 1 Spence, Equity, 164.

[6] 1 Stephen's Com. 564, 565. The

tail,[1] and therefore had the further tortious effect of a feoffment in displacing remainders and reversions;[2] and it was also used to pass the estates and bar the rights of married women. But this last operation appears not to have been tortious, since it was preceded by a private examination of the wife.[3]

Spence, however, says that the fine sur concessit — which was employed where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate de novo by way of supposed composition[4] — was usually resorted to in order to bind by way of estoppel the contingent, or executory, or other estates and interests of married women.[5] And in the same connection he speaks of fines generally as operating by way of estoppel, which might include their operation upon after-acquired interests.

We find no suggestion in the books that this effect of the fine in passing future estates arose otherwise than by virtue of the conveyance itself; and as the fine most commonly in use (that first mentioned) was simply a feoffment of record, it is but reasonable to presume that its operation by way of estoppel was the same as that of a feoffment. It was an acknowledgment in court on the part of the tenant that he had made livery of seisin to the cognizee; that is, that he had had possession of a freehold estate, and had delivered it to the cognizee; and he and his privies were precluded by the record from disputing the fact.

Seisin in the cognizor was always essential to create a life estate or a fee. If a tenant for years, for example, levied the fine without having previously created a freehold by disseisin, it could be avoided by pleading 'partes finis nihil habuerunt.'[6]

The effect of a common recovery was to pass to the recoveror an estate in fee simple absolute, and thereby to bar not only the estate of the tenant in tail, who suffered it, but all remainders and reversions expectant thereon, and all executory limitations and conditions to which the estate tail had been subject.[7] But

references to this valuable work are uniformly to the 7th edition.

[1] 1 Spence, ut supra.
[2] 1 Stephen's Com. 566.
[3] 1 Spence, Equity, 165.
[4] 1 Stephen's Com. 563.
[5] Ibid.
[6] 2 Sanders, Uses, 15.
[7] 1 Stephen's Com. 572; 1 Spence, Equity, 165.

it was necessary in every case of a recovery, following the rules which governed real actions, that the person against whom the action was brought should be actually seised of the freehold, otherwise the recovery was void.[1] The same result must then have followed as in the case of a feoffment. If the tenant were a disseisor, as in the case of the presumptive heir disseising the ancestor in tail, he had a freehold estate; and this the demandant recovered. And when the title descended, it passed of necessity to the recoveror; for the tenant could not enter upon him contrary to his conveyance so as to enfeoff another, or to suffer a fine or another recovery. And an attempt to alien the interest by bargain and sale, grant, or release, would be futile, for the same reason that prevailed where a feoffment had been made. Concerning this method of assurance also we fail to find any the slightest evidence that the 'transcendent effect of estoppel' was anything else than the operation of the assurance itself in its very nature.

A lease for life, like a feoffment, required livery of seisin; and livery in this case equally operated of necessity to give a freehold to the lessee. The conveyance was in fact in its original a feoffment, the estate for life in feudal times being, commonly at least, a fief.[2] 'These estates for life are, like inheritances, of a feudal nature, and were for some time the highest estate that any man could have in a feud, for this was not in its original hereditary. They were accordingly originally conferred with the same feudal solemnities, the same investiture or livery of seisin, as fees themselves.'[3] This method of assurance may therefore be passed over as already explained in its effects upon after-acquired interests in what has been said concerning the feoffment.

It remains to consider the case of a demise of an estate for years. This being less than a freehold interest did not require livery of seisin;[4] and livery was never made except when the

[1] 2 Sanders, Uses, 15; 1 Spence, Equity, 165.

[2] 1 Stephen's Com. 512.

[3] 1 Stephen's Com. 254. See also ib. 172–174, where the feud is more fully explained.

[4] 1 Stephen's Com. 512.

alienor conveyed with the estate for years the remainder to another.[1] And though the livery in such a case was made to the tenant of the particular estate, it was not made for his benefit; it was for the benefit of the remainder-man, inuring to him and creating and vesting in him the freehold during the continuance of the term for years.[2] The tenant was considered, and is still considered, as having possession, but not seisin.[3]

The operation of a lease in respect of the rule of estoppel was and still is peculiar; the rule at law being that where an interest passes by the lease, no estoppel arises concerning after-acquired estates, and the converse where no interest passes.[4] Thus, in the example given by Coke, as last cited, A, lessee for the life of B, makes a lease for years by deed indented, and afterwards purchases the reversion in fee; B dieth; A shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. This, of course, could only occur where the term demised is greater than the estate owned by the lessor; and the reason of it seems to be that the lessor, becoming assignee of the reversion, stands in the shoes of the assignor, who could not be bound by the lease for the excess. However, in equity the lessor upon acquiring an interest equal to that demised will be bound, if the lease was founded on a valuable consideration, to give effect and confirmation to the demise by way of granting a further assurance.[5]

In order, then, to show the operation of the lease upon after-acquired interests, we must suppose that the lessor had no interest at all when the demise was executed. That the lease in such cases has always possessed the efficacy of passing the new estate as soon as acquired is clear. Thus, Mr. Preston, speaking of the old common-law assurances, says: 'An indenture of lease, or a fine sur concessit, for years, operates at first by way of estoppel, and finally when the grantor acquires an ownership, it attaches the seisin and creates an interest, or

[1] 1 Stephen's Com. 512; Coke, Litt. 143 a.

[2] Coke, Litt. 49 a, 49 b.

[3] 3 Washb. Real Prop. 498.

[4] Coke, Litt. 47 b; Doe d. Strode v. Seaton, 2 Cromp. M. & R. 728; Webb v. Austin, 7 Man. & G. 701; ante, pp. 382, 383.

[5] 2 Preston, Abstracts, 217.

produces the relation of landlord and tenant. The term commences by estoppel, but the after-acquired interest renders it *for all purposes* an estate; and it binds the lessor, his heirs *and assigns*, and the lessee and his assignees.'[1] So in the example put in the case of Trevivan *v.* Lawrance,[2] which may be considered as representing the modern law, if a man make a lease by indenture of D, in which he hath nothing, and afterwards purchases D in fee, and suffers it to descend to his heir, or bargains and sells it to A, the heir *or A* shall be bound by this estoppel. In Bacon's Abridgment there is a still stronger example to the effect that the acquisition of title by the lessor will avail the lessee for years, even against a subsequent feoffee of the lessor.[3]

The explanation of this property of the lease seems (apart from the operation of the registry laws) to be found in the fact of the possession of the lessee. Possession is notice of an interest the nature or extent of which a purchaser is bound to ascertain.[4] The purchaser therefore cannot, on the strength of an after-acquired title of the lessor which he (the purchaser) now sets up against the lessee, claim the right to eject the lessee.[5] Now, there cannot be a perfect tenancy without actual possession,[6] but there may be a perfect grant by mere passing of title

[1] 2 Preston, Abstracts, 210.

[2] 1 Salk. 276; s. c. 6 Mod. 258; 2 Ld. Raym. 1036.

[3] Leases, O. See also Webb *v.* Austin, 7 Man. & G. 701.

[4] See 1 Bigelow, Law of Fraud, 390–393.

[5] A more elaborate explanation was given in the second edition of this work, which, however, amounted to much the same thing as the one just given. In substance it was this: 1. The lease is without effect until possession is taken under it. 2. After possession taken by the lessee the lessor is in no situation to give effect to an estate afterwards acquired to a subsequent purchaser, without the consent of the tenant. The tenant's refusal to be cut off would constitute him an adverse holder in respect of the term; which would prevent the sale from taking effect as against the term. The lessor, while able to convey the reversion without having possession, could not convey with it the particular estate against the tenant's will. He could, in other words, convey his seisin (which of course was not parted with by the lease for years), but he could not convey seisin and possession without having possession. The lease would therefore stand.

[6] Coke, Litt. 270 a; 1 Stephen's Com. 513. It is sometimes said that under the Statute of Uses an entry of the lessee of a term is not necessary, the statute transferring the possession to the use. Touchstone, 267, note *e*. But this, if intended as a universal proposition, seems to be inaccurate. Estates less than a freehold are not embraced within the statute, and re-

deeds. Hence the case of the lease does not necessarily carry with it ordinary grants. The estoppel upon the lessor's assign is founded upon notice, not upon any notion of privity between the lessor and the purchaser from him. Privity in estoppel, it cannot be too strongly laid down, is a different thing from privity in contract. The position of privy in contract is one of *mutual* relation, as between contractor and contractee, and cannot be supported without a consideration, actual or (as in a deed) implied. The question, then, of privity in such a case, supposing the existence of a consideration, is the question whether the supposed privy may be treated as *party* to the contract. Privity in estoppel, on the other hand, is purely a relation of succession or subordination of rights, and is inconsistent with consideration, or at least independent of it. The heir is the type of a privy in the law of estoppel. He is bound because he takes without value. It is right that he should be bound; no injustice is done him. Purchase for value without notice cuts away equitable claims, and even legal claims (e. g. actions for breach of contract) which do not amount to estates. Privity is wanting, and notice is excluded. If in the case in question the lessee were not in possession, one who purchased of the lessor

main as they stood before. 3 Washb. Real Prop. 378. The statute carries the possession of present freehold estates to the grantee (cestui que use) by declaring that the *seisin* shall pass to him, and in no other way; and if an interest less than a freehold be alienated, the possession does not pass since the seisin remains in the grantor. In the first case there was at common law a livery of seisin, which was of course a delivery of the possession and the freehold; in the latter there never was livery, and the consequence is that the possession as well as seisin remains in the alienor, and that an entry is necessary to give the tenant a possession. And the editor of the Touchstone, unless his remark is limited, is inconsistent with himself; for in the same note he says that a person having only an interesse termini cannot maintain trespass or ejectment. But why not, if the statute gives him direct possession? His right would not be an interesse termini at all, if the editor be correct (and this he himself suggests), but an estate in possession. That there is no transfer of possession in such a case is stated in Coke, Litt. 270 a. 'Before entry,' says Coke, 'the lessee has but interesse termini, an interest of a term, and no possession.' There is one case, however, where the statute does transfer the possession to a lessee; but that is the case of a lease followed by a release of the reversion. In that case if the lessee should not enter under the lease, both the seisin and the possession would remain in the lessor; and upon executing a release the statute would execute the use by transferring the seisin, and with it of course the possession.

for value would take the estate free from the claims of the lessee unless he had notice in some other way.

Of the other common-law assurances, none have had the efficacy before or since the Statute of Uses, even with warranty, of transmitting future estates in any other sense than that in which the lease has been seen to operate. The only assurances that need be considered are the release, lease and release, grant, and bargain and sale; the rest being of a character never to raise a question of this kind.

The purpose of the release was to effect a conveyance of an ulterior interest in lands or tenements to a particular tenant, or of an undivided share therein to a co-tenant, or of the right to such lands or tenements to a person wrongfully in possession thereof. If the releasor had nothing to release, the release was void, even though, as it seems, it was accompanied with a warranty. In other cases of warranty, and solely by reason of the warranty,[1] the releasor was precluded from setting up an after-acquired interest; but there was this in the nature of the situation to prevent him from conveying the new estate to another, to wit, that the releasee's being in possession would (as in the ordinary case of a lease) fix upon others notice of his rights.

What has been said of the release is equally applicable to the assurance by way of lease and release. It gave no additional efficacy to this mode of conveyance that it was of a double character. The lease was usually a bargain and sale for a year or some other short term; and the release that followed was the instrument already described. It was void if the releasor had no estate; and it was void, though he had an estate, if the lessee had not entered.[2] Nor would it have changed the case had the releasor added a warranty, since a warranty at common law was void without an estate.[3] There was no livery of seisin connected with the conveyance; and it never had a tortious operation. Vice-Chancellor Leach, it is true, in one well-known

[1] Because at common law the warranty required an estate to support it. Rawle, Covenants, 413, 4th ed.

[2] Coke, Litt. 270 a; 1 Stephen's Com. 519.

[3] Rawle, Covenants, 413, 4th ed.; Seymor's Case, 10 Coke, 96.

instance,[1] declared that a conveyance by lease and release of itself alone worked an estoppel; but the only question before him was whether there was an estoppel against the releasor and by consequence against a purchaser with notice, which is not the question now under consideration. In point of fact there was a specific recital of title in the release, and upon this ground the ruling upon the existence of an estoppel was affirmed by the Lord Chancellor.[2] The opinion of the Vice-Chancellor, it may be added, that a deed of release of itself estopped the releasor from claiming an after-acquired estate was soon after impugned and overruled.[3] The estoppel will not arise for such purpose unless there be a specific recital of a definite estate, as the cases just cited show;[4] and this too, as it seems, though there be a warranty in common form. The effect of the deed seems therefore much the same as that of a conveyance of right, title, and interest as understood in Massachusetts and Maine.[5]

The common-law grant was employed for conveying reversions and remainders and incorporeal hereditaments, such as advowsons, rents, and the like.[6] There is no suggestion that it was ever used for any other purpose. Livery of seisin was of course inapplicable to it;[7] and it results that it could never pass more than the interest which the grantor had. It never worked a discontinuance when made by a tenant in tail of an advowson, common, remainder, or any other inheritance lying in grant.[8] So too the grant of a rent-charge out of lands of which the grantor was not seised at the time of the grant was void, though the grantor afterwards purchased the same lands.[9]

The last of the common-law assurances to be noticed, that by bargain and sale, needs a more particular examination; for that

[1] Bensley *v.* Burdon, 2 Sim. & S. 519.

[2] 8 L. J. Ch. 85.

[3] Right *v.* Bucknell, 2 Barn. & Ad. 278; Lloyd *v.* Lloyd, 4 Dru. & War. 369; General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15, 22.

[4] See also Heath *v.* Crealock, L. R. 10 Ch. 30; Crofts *v.* Middleton, 2 Kay & J. 194.

[5] Ante, pp. 402–405.

[6] 1 Stephen's Com. 510, 511; 2 Sanders, Uses, 25.

[7] Stephen's Com. 510, 511; 2 Sanders, Uses, 25.

[8] 2 Sanders, Uses, 41; Coke, Litt. 332.

[9] 2 Sanders, Uses, 28.

has come down to modern times, possessed of the same characteristics as distinguished it before the time of Henry VIII., modified only by the Statute of Uses.

This conveyance originated from an equitable construction adopted by the Court of Chancery. A bargain was made or a contract entered into for the sale of an estate, and the purchase-money paid; but there was either no conveyance at all of the legal estate, or a conveyance defective at law by reason of the omission of livery of seisin, or (when the reversion or remainder was aliened) of attornment. Such was the situation before the Statute of Uses. The Court of Chancery, however, rightfully thought the estate ought in conscience to belong to the person who paid the money, and therefore considered the bargainor or contractor as a trustee for him.[1] An equitable interest in land thus raised in the first instance by the payment of money upon a mere contract, or upon a conveyance inoperative at law, became in process of time transferable by a formal conveyance under the name of a bargain and sale.[2]

Courts of law in no respect recognized this conveyance, or the claim of the bargainee under it.[3] The only redress the bargainee had for a failure on the part of the bargainor to perform the duties of his trust was through the Court of Chancery; and even here the relief was often inadequate, as where the bargainor was afterwards disseised by another.[4] This was not, however, peculiar to conveyances by bargain and sale; it was equally true of all conveyances to uses.[5]

The trust thus raised was called a use; and this is defined to be the right in one person, the cestui que use, to take the profits of land of which another has the legal title *and possession*, coupled with the duty of defending the same, and of making estates thereof according to the direction of the cestui que use.[6] It will be observed that the definition requires of the holder of the legal estate possession of the land, and with good reason;

[1] 2 Sanders, Uses, 43; 1 Spence, Equity, 452; 2 Washb. Real Prop. 292.

[2] Ibid.

[3] 1 Spence, Equity, 442; 2 Washb. Real Prop. 360.

[4] 1 Spence, Equity, 445; 2 Washb. Real Prop. 360.

[5] Ibid.

[6] Tudor's Lead. Cas. 252; Chudleigh's Case, 1 Coke, 121; 2 Washb. Real Prop. 358.

for how could a use, i. e. a beneficial enjoyment, be granted where the bargainor had himself no enjoyment of the land? A bargainor of a present estate of freehold when out of possession could not then create a use against the consent of the tenant; and there was, therefore, nothing for even the Court of Chancery to take cognizance of in such a case.

That this is true appears abundantly from the chapter on Bargain and Sale in Sanders.[1] 'There must be a use,' he says, 'and a seisin to serve it, in every bargain and sale.'[2] And on the following page: 'All corporeal hereditaments of which the bargainor has a seisin, and all incorporeal hereditaments in actual existence, may be conveyed by bargain and sale, because they may be limited to uses.'

Now, it would seem to make no difference whether the bargainor owned the premises and had been disseised, or had no title at all; for in either case having no seisin, there could be nothing upon which to raise a use. If, then, he should afterwards acquire in the one case the seisin, or in the other the title and seisin, he could convey again by bargain and sale; and the second grantee, if he were a bona fide purchaser, would acquire the right to protection in chancery against the first grantee.

But if the bargainor had seisin, though as a disseisor, a use would at once arise upon the contract, and the bargainee would come within the protection of chancery as cestui que use. Still, since the bargainee's interest was not regarded at law, the bargainor, in whom the seisin was held to remain, could make livery before or after title acquired to one having no notice of the previous bargain and sale; and this alienee would hold the premises both at law and in equity.[3] Upon this point the Statute of Uses has effected a radical change, as will be seen later. In short, the bargain and sale at common law was one of the 'innocent conveyances' of the law, operating merely upon what the grantor might lawfully convey. It could not work a discontinuance, create a forfeiture, or destroy contingent remainders dependent upon particular estates.[4]

[1] 2 Sanders, Uses, 43–59.
[2] Page 50.
[3] 1 Spence, Equity, 445.
[4] 2 Sanders, Uses, 54.

A bargain and sale for a term of years, however, had a different effect, since this was a lease. Such a conveyance, as it did not create a trust and confidence repugnant to the ownership of the legal estate, was upheld at law; and the lessee was considered on entry to have the possession, and could maintain trespass or ejectment in case of an ouster. A bargainee was therefore safer in taking the conveyance of a term than one of the fee.

It seems clear that a clause of warranty could not change the effect of the conveyance so as to cause future interests to pass directly to the use of the bargainee, even when the bargainor had possession; for in any view it must have been very different in character from the warranty of the feoffment. That warranty, as we have attempted to show, was, when applied between feoffor and feoffee, simply an expression of the necessary effect of the feoffment itself. It derived its potency from the peculiar nature of the assurance. But a bargain and sale before the Statute of Uses was an imbecile assurance at law, creating as it did a trust which was regarded as wholly repugnant to legal notions and void; and it can scarcely be conceived that the addition of a warranty could give it standing. 'The cestui que trust [use],' says Spence, 'having, as it was held, neither jus in re nor jus ad rem, there was no form of action at the common law which could possibly have afforded any remedy, either as regards the land or the profits. If the law had interfered at all, it could only have been by giving a personal remedy for a breach of the confidence reposed,'[1] which confidence, he says in the same connection, was wholly repugnant to common-law principles. It seems equally clear that a warranty could be of no service in chancery; for that court proceeded entirely upon the principle that he who paid for the estate should have the use of it, as he was in equity and good conscience entitled. A warranty could have added nothing to the right in this view; and there is nothing in the books to show that the Court of Chancery took any notice of it, if indeed a warranty was ever employed in this kind of conveyance before the Statute of Uses. When the bargainor had an estate, chancery upheld the trust

[1] 1 Spence, Equity, 443.

without a warranty; if he had none, the warranty itself was void.[1]

This view of the operation of the common-law assurances shows that possession and seisin in an alienor who had no title were always essential in order to save the alienee harmless from a second conveyance made on title acquired, and that in one case, that of the bargain and sale, not even these (except in estates for years) were sufficient; that form of conveyance being totally inadequate at law to pass title to estates in possession, though the bargainor had a complete title and right to convey.

We turn now to conveyances under the Statute of Uses. That statute dispensed with the necessity of livery of seisin by providing that he to whose use another was seised should be considered as the legal owner of the estate; so that the interests of cestuis que use now became legal estates, and commanded full recognition from the common-law courts. Under this statute feoffments became more and more infrequent, and finally obsolete; and fines and common recoveries, having been abolished in England and never having gained a strong foothold in this country, are now unknown.

In the further consideration of the effect of the Statute of Uses upon the doctrine of title by estoppel, the bargain and sale may be selected for examination as containing the essence and potency of all existing modes of assurance. Now, it is safe to affirm as a preliminary step that none of our present conveyances operate to pass future interests in any case by virtue of the conveyance;[2] and that the only way in which such an object can be effected in the most favorable circumstances is by

[1] Even since the statute equity may, it seems, sometimes decree a conveyance of the new interest though there was no warranty. Whitfield *v.* Fausset, 1 Ves. Sr. 389; Wright *v.* Wright, ib. 409.

[2] See Heath *v.* Crealock, L. R. 10 Ch. 30; General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15, 21, Jessel, M. R.; Moore *v.* Willis, 2 Hawks, 559. In the last-named case Henderson, J. a very able and learned common lawyer, said that if A sold land to B by indenture, he thereby affirmed that he had title when he made the deed, and if he had not, but afterwards acquired one, the claim of B to it would prevail against A, 'not because A passed to him any title by his deed, for he had none then to pass, but because A is precluded from showing the fact.' See Cuthrell *v.* Hawkins, 98 N. Car. 203, 205; infra, pp. 433 et seq.

the introduction of appropriate covenants of warranty or for further assurance, or of covenants of seisin and title, or of an express or implied recital of the nature of the interest owned and aliened. There are, indeed, many dicta of the courts, with a few express decisions, giving color to the idea that a deed of bargain and sale, with any of these additions of covenant or recital, always operates upon after-acquired interests so as to cause them to pass to the grantee as effectually as if the grantor had had title when he executed his deed. Mr. Rawle, in his valuable work on Covenants, makes a very broad and just impeachment of our courts upon this point, and says that in most of the states it is held that the presence of a covenant of general warranty in a conveyance will not only estop the grantor and his heirs from setting up an after-acquired title, but will, by force of the covenant, have the effect of actually transferring the new estate in the same manner as if it had originally passed by the deed; and he cites a cloud of cases for the statement.[1] Few of the cases, however, required any decision of this question; and the statements of the courts are for the greater part mere generalities, having reference to the relation of grantor and grantee or their real privies.

In Somes *v.* Skinner[2] Chief Justice Parker, after referring to several of the early authorities, says: 'The general principle to be deduced from all these authorities is that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor.'

Now this can scarcely be considered a dictum, for the question required a solution of the state of the title, the point not arising between grantor and grantee. But the defendant was only a trespasser (asserting no legal claim to the particular locus), and not a subsequent purchaser without notice. And the learned Chief Justice immediately says: 'It would be but a feeble title which would not enable the holder to defend his

[1] Rawle, Covenants, 404, 4th ed. [2] 3 Pick. 52, 60.

possession against trespassers or those who should attempt to disseise him after his title is established.'

Whether the court intended to narrow the foregoing statement of the authorities to the facts of the case does not clearly appear; but this at all events was done in a subsequent case,[1] where Mr. Justice Thomas said: 'An examination of the whole opinion in that case [Somes *v.* Skinner] would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was that where a title has inured by estoppel it will avail the grantee, not only against the grantor and his heirs, but strangers who usurp possession without right; and under the facts of the case, and in the view in which it was applied, there is no occasion to reconsider the rule there stated.' It is to be observed also that the authorities from which the Chief Justice in Somes *v.* Skinner deduces his general principle are the old ones relating to feoffments and fines, which have always been conceded to pass future interests.

In Bean *v.* Welsh[2] a question arose similar to that in Somes *v.* Skinner. The plaintiff in trespass to try title relied upon a title by estoppel against her grantor, who had conveyed to her with warranty, and before the present suit had acquired the ownership. The defendant was a stranger, setting up no title but relying upon the plaintiff's want of any. The plaintiff recovered. The court indeed used broad language upon the point of estoppel. 'We think,' it was said, 'the principle is well settled that an estoppel will not only bar a right or title, but will pass one to him in whose favor the estoppel works.' But this proposition is narrowed to the facts of the case, for the court proceeds at once to say: 'If indeed an estoppel could not operate as a conveyance, or as a medium through which the title would pass to him in whose favor the estoppel works, we might frequently lock up the title in him and his heirs against whom the estoppel operated, and the party for whose benefit it was intended might find himself without title and unable to recover from a mere intruder; for if the title to the after-acquired estate did not pass

[1] Blanchard *v.* Ellis, 1 Gray, 195, 201. [2] 17 Ala. 770.

to the grantee by means of the estoppel, but it only precluded the grantee from asserting an after-acquired title, it would be difficult to see how he could recover in ejectment from one who had no title. To show title in another would not enable him to recover; and he, having none, could not maintain the suit. To give, therefore, the full effect to an estoppel it is clear that it must *frequently* operate to pass the title.'

In Cole *v.* Raymond[1] Chief Justice Shaw says: 'It is a well-established rule of law that although a deed as a present conveyance transfers only the title which the grantor then has, yet if it is a deed in fee with warranty, it has a further operation as a covenant real running with the land, by which the grantor and his heirs are bound to make it good; so that if the grantor has no good and sufficient title to the estate, yet if he or they afterwards acquire a good title, it forthwith inures to the benefit of the grantee to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel if the action be brought in such a form that it may be pleaded by way of estoppel; otherwise by way of rebuttal to the claim of any one bound by such warranty.'[2]

This was said in a contest between the grantee before title and a purchaser after title, and seems therefore to be an express decision that there is an actual transmission of the after-acquired estate. But the case of Blanchard *v.* Ellis, supra, was not cited by counsel or mentioned by the court; and it is not to be supposed that it was intended to overrule that well-reasoned case. And it would seem that Cole *v.* Raymond might be supported upon other grounds than those assumed. The grantor being seised of a life estate in the premises, conveyed them in fee to the defendants, who apparently went into possession; and they thus acquired a legal estate under the Statute of Uses. The second conveyance was made by the son of the first grantor

[1] 9 Gray, 217, 218.

[2] If the second grantee himself acquire the new title from another source than his own estopped grantor, he will be allowed, it seems, even in Massachusetts to keep the land upon condition of reimbursing the first grantee in the amount of his outlay; and this though the second grantee took with notice. Smith *v.* Hitchcock, 130 Mass. 570.

after the latter's death, the son having now acquired title in fee by descent from his mother; but the son had by express obligation taken upon himself the father's warranty. Now, as the son had no possession, his conveyance to Cole (the plaintiff) would be void under the champerty acts, the land being at the time in the adverse possession of the respondents. And Cole could not set up his claim in the name of the son, for the son having assumed his father's warranty was estopped. It was not necessary, therefore, to hold that the after-acquired title had actually passed to the defendants.[1] However, the Supreme Court of Massachusetts has recently reaffirmed the doctrine under criticism, declaring it to be settled in that state that the estoppel prevails against the second grantee as well as against his grantor.[2]

There are other cases which hold the same doctrine, and in even stronger terms;[3] especially Jarvis *v.* Aikens, which also was a contest between the first grantee and a purchaser after title acquired. But this case, besides arising under the recording acts, was decided partly upon the authority of Trevivan *v.* Lawrance, the case of the lease already considered, and partly upon other early cases which were decided upon the common-law doctrine of estoppel. The doctrine of the court in Douglass *v.* Scott[4] was also referred to with approval, where it was said: 'The obligation created by estoppel not only binds the party making it but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate; it becomes a muniment of title, and all who afterwards acquire the title take it subject to the burden which the existence of the fact imposes

[1] In regard to Cole *v.* Raymond, see Russ *v.* Alpaugh, 118 Mass. 369.

[2] Knight *v.* Thayer, 125 Mass. 25, citing Somes *v.* Skinner, supra; White *v.* Patten, 24 Pick. 324; Russ *v.* Alpaugh, 118 Mass. 369, 376.

[3] Jarvis *v.* Aikens, 25 Vt. 635; Doe d. Potts *v.* Dowdall, 3 Houst. 369; Tifft *v.* Munson, 57 N. Y. 97 (two judges dissenting); McCusker *v.* McEvey, 9 R. I. 525. Dissenting opinion of Potter, J. in 10 R. I. 606. In all of these cases, however, the question arose under the recording acts. See also McCarthy *v.* Mann, 19 Wall. 20, under an act of Congress.

[4] 5 Ohio, 198.

upon it.'[1] Upon which it is to be observed that if this expression of opinion was intended to cover more than the case before the court, it was soon afterwards disapproved in Buckingham *v.* Hanna,[2] where, referring to Douglass *v.* Scott and other cases, it is said: 'The import of the language in these cases is certainly unmistakable. It supposes the after-acquired title to pass from the grantor *to his heirs or assigns*, but still conclusively bound by the estoppel.' We shall endeavor to show presently that the assigns, when purchasers without notice, come in, not as privies under the grantor, but with adverse rights, and that when put into possession by the grantor they cannot be disturbed by the first grantee.

Cases are not wanting in which the doctrine of the transmission of the new interest is denied.[3] The Supreme Court of Ohio has denied it in Buckingham *v.* Hanna.[4] One Ramey mortgaged with warranty land to which he had no title, and subsequently obtained a patent for the land. It appears that one Eveland, under whom the defendant claimed, had an equitable title prior to the mortgage of Ramey, and that he had afterwards obtained a decree that the patent should be considered as obtained in trust for him, Eveland, and that a legal conveyance should be made by Ramey. These proceedings were put in evidence in an ejectment by Ramey's mortgagee against Eveland's grantee. Now, it was claimed for the plaintiff that when Ramey became invested with the legal title by patent from the government, that title instantly passed to the mortgagee by force of the warranty, and that there was consequently no title remaining in Ramey upon which the decree afterwards obtained by Eveland could operate. But the court in an able opinion ruled otherwise. However, the point was not considered material in the case, since Eveland had claimed by an equitable title paramount to that of Ramey, and anterior to the date of the mortgage.

One of the grounds taken by the court was that if the title

[1] See also Bank of Utica *v.* Mersereau, 3 Barb. Ch. 568.

[2] 2 Ohio St. 551.

[3] See General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15, 24, Jessel, M. R.; Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113 (where the question was not decided); Robinson *v.* Douthit, 64 Texas, 101, 106 (question not decided).

[4] 2 Ohio St. 551.

passed in such cases as soon as acquired, the grantee could not recover on his covenant of warranty; and this brings us to Blanchard *v.* Ellis,[1] already mentioned. There it was decided that though upon eviction of a grantee his grantor (who had conveyed with warranty) had acquired a paramount title to the premises, this would not prevent the grantee from maintaining an action on the covenant against encumbrances and recovering the amount paid for the land, with interest. 'Strictly speaking,' said Mr. Justice Thomas, 'there would seem to be no transmutation of estate when the new title comes to the grantor. Nor is there any force in the original deed to convey a title not then existing in the grantor; for nothing can pass but his then existing title. But the grantor and those claiming under him are estopped to deny the validity of the title which he has solemnly asserted, and to set up a title against it. The law presumes that he has spoken and acted according to the truth of the case, and will not permit him, or those claiming under him, to deny it. . . . It might be curious to trace the progress of this doctrine of estoppel as applicable to the covenant of warranty from the simple rebutter of Lord Coke,[2] which should bar a future right to avoid a circuity of action, to its present condition, in which there is claimed for it the full force of a feoffment, or fine, or common recovery at the common law; that is, having the function of actually divesting the feoffor or conusor of any estate which he might thereafter acquire.[3] But waiving, because not necessary to our purpose, the discussion of the origin and extent of the doctrine of estoppel, it will be sufficient to say that we do not feel called upon to extend its application. . . . Supposing it to be well settled that if a new title come to the grantor before the eviction of his grantee, it would inure to him, and not deciding, because the case does not require it, whether the grantee even after eviction might elect to take such new title, and the grantor be estopped to deny it, we place the decision of this case on this precise ground, — that where a deed of

[1] 1 Gray, 195.

[2] Coke, Litt. 265 a.

[3] The writer personally knows that the opinion of this able judge was to the last very strongly against the notion that the covenant of warranty, however broad, could have the effect of actually transmitting an estate.

land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot after such entire eviction of the grantee purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it.'[1]

The point has been more directly decided in Pennsylvania. In Chew *v.* Barnet[2] certain parties sold to James Wilson a large tract of land under articles by which he was to reconvey the same in mortgage, and agreed that they would have patents for the same taken out in his name. Before this agreement was performed Wilson conveyed the land with covenants of warranty and for further assurance to the plaintiff Chew. Afterwards the patents were conveyed to Wilson, who gave back a mortgage of the lands as security for the purchase-money. The defendants claimed under this mortgage; and the court in an action of ejectment by Chew decided in their favor. We quote from the opinion which was delivered by Mr. Justice Gibson, afterwards Chief Justice: 'What is the nature,' he asks, 'of the estate which Mr. Chew acquired by the conveyance from Judge [James] Wilson? When that conveyance was executed, the legal title was in Jeremiah Parker by patents from the commonwealth; and Judge Wilson, having nothing but an equitable title under the articles, could convey nothing more. His deed therefore passed to Mr. Chew only an equitable title. But it is said the subsequent conveyance from Jeremiah Parker to Judge Wilson inured to the benefit of Mr. Chew. It did so, but only in equity, and to entitle him to call for a conveyance from Judge Wilson, and not as vesting the title in him of itself, as contended, by estoppel. The facts present the ordinary case of a conveyance before the grantor has acquired the title; in which the convey-

[1] See to the same effect Burton *v.* Reeds, 20 Ind. 87; Noonan *v.* Ilsley, 21 Wis. 139; Innis *v.* Lyman, 62 Wis. 191; Nichol *v.* Alexander, 28 Wis. 118; Tucker *v.* Clarke, 2 Sandf. Ch. 96; Bingham *v.* Weiderwax, 1 Comst. 509; Woods *v.* North, 6 Humph. 309. Contra, Reese *v.* Smith, 12 Mo. 344, a remarkable case, in which the court compelled the grantee to take an after-acquired title, and enjoined a judgment at law on the covenants. Scott, J. dissented.

[2] 11 Serg. & R. 389.

ance operates as *an agreement* to convey, which when the title has been subsequently acquired may be enforced in chancery. . . . But it is argued that as the deed to Mr. Chew contains a covenant for further assurance, it is to be considered as a covenant to stand seised to the use of the grantee; and consequently that the estate was executed in him as soon as the seisin arose out of which the use was to be served. It is true that no particular form of words is essential to a conveyance to uses, but the deed, if it cannot operate in one way, may in another to effectuate the manifest intention of the grantor. But here there is not a single feature of a covenant to stand seised, the consideration of which is always blood or marriage; nor is there any of a bargain and sale, where the consideration is valuable; for in every conveyance to uses the covenantor or bargainor must be seised of the legal estate at the time, as the use must arise out of such seisin. In the case of a conveyance before the grantor has acquired the title the legal estate is not transferred by the Statute of Uses; but the conveyance operates, as I have said, as an agreement which the grantee is entitled to have executed in chancery, as was decided in Whitfield *v.* Fausset.'[1]

The court of Pennsylvania in Brown *v.* McCormick[2] seems, however, to have restricted the doctrine of Chew *v.* Barnet to the position that the purchaser of an equitable title takes it subject to all the countervailing equities to which it was subject in the hands of the person from whom he purchased; the equity in that case being a right against Wilson of security for the purchase-money, a right to a mortgage under the articles from which the first grantee could not escape.[3] And in the above-cited case of Brown *v.* McCormick the first grantee was preferred to the second; but the first grantee was put into possession, which would be a sufficient reason for the decision.

The same subject was considered in Jackson *v.* Bradford.[4] The premises had been conveyed to the defendant by one Price by deed with a covenant of non-claim. Price had at the time no title, but subsequently the title came to him by descent.

[1] 1 Ves. Sr. 391.
[2] 6 Watts, 60.
[3] See also Bellas *v.* McCarty, 10 Watts, 26.
[4] 4 Wend. 619.

The plaintiff claimed by virtue of a judgment and sheriff's sale of the land as the property of Price, after his father's death; and his claim was sustained. Mr. Justice Marcy, who delivered the opinion, said: 'The judgment eo instanti the property descended became a lien upon it, and the title to it vested in the purchaser at the sheriff's sale, unless the operation of the deeds to the defendant prevented it. When these deeds were executed, Price had no title or claim to the premises, and could therefore convey no right to them. Qui non habet, ille non dat. A grant by a person who has no estate, as an heir in the lifetime of his ancestor, will not pass any estate.[1] This position is well warranted by Sir Marmaduke Wivel's Case.[2] In that case a tenant in tail of an advowson, and his son and heir, joined in a grant of the next avoidance. The tenant in tail died; and it was held that the grant was utterly void against the son and heir who had joined in the grant, because he had nothing in the advowson, either in possession or right, or actual possibility,[3] at the time of the grant. It is said in the Touchstone[4] that a bare possibility of an interest, which is uncertain, is not grantable. The expectancy of an heir-at-law in the life of the ancestor (and such was the defendant's grantor in this case) is less than a possibility.[5] . . . It is very clear both from reason and authority that no title passes by the deed of an heir apparent or presumptive to lands that may afterwards descend to him on the death of his ancestor; yet the heir may be barred by his deed from recovering such lands. Where the deed is by warranty, the warranty will rebut and bar the grantor and his heirs of a future right. This is not because a title ever passes by such a grant, but the principle of avoiding circuity of action interposes and stops the grantor from impeaching a title to the soundness of which he must answer on his warranty.' The learned judge thought, however, that there was not even a rebutter in the case, on the ground that no action could be maintained upon a covenant of non-claim. There are other cases which support this view, but they need not be set out.[6]

[1] 3 Preston, Abstracts, 25, 26.

[2] Hob. 45.

[3] See Lord Hardwicke's explanation of this, 1 Ves. Sr. 391.

[4] Page 239.

[5] Wright *v.* Wright, 1 Ves. Sr. 409.

[6] See Bivins *v.* Vinzant, 15 Ga. 521;

In looking upon these authorities as standing upon sound principle it will not be necessary to cast discredit upon the modern covenant of warranty (or that of seisin and title) as not an efficient instrument of rebutter. There is no doubt that the modern covenant may be employed to as good purpose against a grantor (for value) as could the old warranty of the feoffment. But that it has not the potency directly to transmit after-acquired interests can, we think, be satisfactorily shown.

There is, however, as there was under the old warranty, a distinction between cases where the grantor having no title has a seisin (that is, by disseisin) and where he has not. We purpose to devote the remainder of this discussion to the consideration of these two situations, taking first the case of a warranty in a bargain and sale by one having neither title nor seisin.

Such a case clearly is not within the Statute of Uses; for there is no seisin out of which to serve a use. It is a familiar rule that to bring an estate within the operation of this statute it is necessary that three things should concur: first, a person seised to a use; secondly, a cestui que use in esse; thirdly, a use in esse, either in possession, reversion, or remainder.[1] It is essential that it should be an estate of which the grantor has or is entitled to have the seisin at the time of the grant; and it is accordingly held that no use can be raised by a covenant to stand seised of land of which the covenantor is not at the time seised.[2] So too it is said that if a joint tenant covenant to stand seised of the moiety of his companion after his death, it is void although the covenantor survive.[3]

After an extensive examination of the authorities we have been unable to find any suggestion that the Statute of Uses operates upon interests acquired after the grant when the conveyance was made by one having no title. It is distinctly laid down that there must be a seisin in esse, to pass simultaneously

Way *v.* Arnold, 18 Ga. 181; Faircloth *v.* Jordan, 18 Ga. 350; Jacocks *v.* Gilliam, 3 Murph. 47; s. c. 4 Hawks, 310; Dodd *v.* Williams, 3 Mo. App. 278.

[1] 3 Washb. Real Prop. 376–380; 1 Cruise, Dig. 349; Tudor's Lead. Cas. 258; Crabb, Real Prop. § 1646.

[2] Ibid.; Moore, 342; Croke, Eliz. 301; Sanders, Uses, 83.

[3] 2 Rolle, Abr. 790, pl. 9.

with the use, in order to bring the conveyance within the terms of the statute.[1] And the only instance in which a use is said to inure to another after a conveyance, and with it a seisin, so as to constitute a legal estate under the statute, occurs in the case of springing and shifting uses. But as the examples all show, it is as essential to a conveyance containing such executory limitations that the grantor have himself a seisin out of which to serve the several uses as in other conveyances.[2] And it is clear that a contingent use cannot be executed by the statute while the contingency remains suspended.[3]

If the case supposed does not come within the statute, it must stand, apart from the warranty, as at common law. But we have seen that at common law a bargain and sale was void both at law and in equity without possession in one of the parties; and that the presence of a warranty could not aid the case, since it would be void for want of an estate, and since equity proceeded independently of the warranty. That is, at common law there would not even be a rebutter in such a case. It would probably be carrying the case too far to assert the same rule of such a conveyance at the present time. That the modern covenant of warranty is not to be confined in its operation within the narrow limits of the common-law warranty is universally conceded; and there is no good reason in principle why the covenant should not now be as efficient without as with an estate. But we do not think that it could avail for anything more (aside from giving the grantee a right of action in case of a breach) than a rebutter to the grantor and those in privity with him. 'Can you produce,' said a great judge to counsel in a recent case, 'any authority for the proposition that an estoppel can be created by a covenant?' And counsel could not.[4]

[1] 1 Cruise, Dig. 353.

[2] See 2 Touchstone, 529, note; 1 Spence, Equity, 483, 484, note. See also the example given by Lord Hale, C. J. in Weale *v.* Lower, Pollexf. 65: 'If a feoffment be made to the use of C and his heirs after the death of A and B, this is no remainder, but a future use, and the feoffee is seised in fee simple. . . . So if the limitation of a use be that after two years, or after the death of John at Stiles, it shall be to the use of J N in fee, the feoffor hath the fee simple remaining in him until this future use come in esse.'

[3] 1 Sanders, Uses, 231.

[4] Jessel, M. R. in General Finance Co. *v.* Liberator Soc., 10 Ch. D. 15, 18,

Warranty, even in its palmy days, when collateral as well as lineal warranty flourished in all its vigor, never possessed the power of conveyance.[1] It was a well-established principle that it could not enlarge an estate, having no tortious effect; and therefore when employed in aid of a wrongful alienation, it operated only against the alienor and his representatives. It always took effect if at all in one of three ways, — by rebutter, voucher, or warrantia chartæ. It cannot, we apprehend, do more now. If title could actually pass when subsequently acquired, by the mere use of a warranty or other covenant, it would often be in the power of an heir to defeat the claims of the creditors of the ancestor. A conveyance with warranty made before the ancestor's death would, if not proved covinous, bring about this result. There is no need of extending the power of a warranty; it is sufficient for all proper purposes that it can be used effectively whenever the grantor or his privies attempt to defeat his expressed intention. Besides, if a covenant of warranty possessed such efficacy, it might well be asked, Why should the grantee in such a case be allowed to go into equity, and call for a further assurance from the grantor? And what is meant when it is said in cases of admitted authority on this point that the original deed is an agreement to convey the after-acquired interest, which equity will enforce?[2] Again, how impotent a warranty is to pass an estate may be seen by the rule that a tenant in tail in *remainder* cannot, in the absence of statute, bar the entail or pass an estate by warranty deed; no estoppel arises in such a case.[3]

24. Of course it was not intended to question the operation of a covenant by way of rebutter.

[1] See 2 Smith's L. C. 725, 6th Am. ed.

[2] Whitfield *v.* Fausset, 1 Ves. Sr. 389; Wright *v.* Wright, ib. 409; Taylor *v.* Dabar, 1 Cas. in Ch. 274; Noel *v.* Bewley, 3 Sim. 103; Smith *v.* Baker, 1 Younge & C. Ch. 223; Goodson *v.* Beacham, 24 Ga. 154; McWilliams *v.* Nisly, 2 Serg. & R. 515; Chew *v.* Barnet, 11 Serg. & R. 389; Steiner *v.* Baugman, 12 Penn. St. 108; Chauvin *v.* Wagner, 18 Mo. 531; 2 Sugden, Vendors, 541. But see Bensley *v.* Burdon, 2 Sim. & S. 519; s. c. 8 L. J. Ch. 85, in which equity refused to interfere as against a purchaser with notice of the estoppel. The better opinion, however, is in favor of exercising the jurisdiction in such cases.

[3] Allen *v.* Ashley School Fund, 102 Mass. 262. See Whittaker *v.* Whittaker, 99 Mass. 364; Holland *v.* Cruft, 3 Gray, 162. Secus, of course, under the statute, in the case of such deed by tenant in tail in *possession*.

Some of the cases, however, stop short of asserting that the warranty operates as a conveyance, but take a view scarcely less objectionable. Thus, the court of Ohio have said in Douglass *v.* Scott that the estoppel by warranty 'adheres to the land, is transmitted with the estate; it becomes a muniment of title, and all who afterwards acquire the title take it subject to the burden which the existence of the fact imposes upon it.' Now, it is apprehended that this is wholly at variance with the principle upon which burdens fall upon third persons; for it is an elementary principle that a purchaser of land for value without notice takes it free from its latent burdens.[1] Conveyances by bargain and sale not being accompanied by livery have never been of a nature to affect the world with notice of their existence, except under the enrolment and registry laws. Before the English enrolment act they were resorted to because they were secret.[2] And Mr. Rawle declares that even under the American registry acts a grantee is not bound to take notice of a conveyance made by his grantor before he had a title.[3] There is the greatest force in this statement; and it is apprehended that experienced conveyancers would agree in affirming its correctness. Besides, there is direct and sufficient authority for the doctrine.[4]

It may, however, be supposed from the analogy of the relation of feoffor and feoffee that there is privity between the second grantee and his grantor, by which the former is precluded from claiming the land; and there is some color of authority for this position. Thus, in Bacon's Abridgment[5] it is said that the reason why the feoffee takes subject to the lease is that, coming in under one who is estopped, he shall himself be estopped; and similar statements are sometimes made in cases of grantor and grantee.[6]

[1] See Vredenburgh *v.* Burnet, 31 N. J. Eq. 229.

[2] 1 Stephen's Com. 534.

[3] Rawle, Covenants, 428, 4th ed.

[4] Dodd *v.* Williams, 3 Mo. App. 278; State *v.* Bradish, 14 Mass. 296, 303. Comp. Morse *v.* Curtis, 140 Mass. 112. And see dissenting opinion of Potter, J. in McCusker *v.* McEvey, 10 R. I. 606.

[5] Leases, O.

[6] See Armstrong *v.* Wheeler, 52 Conn. 428. The true ground of this case was not privity, but that the party who owned the right in question owned it not only against his grantor but also against everybody, especially purchasers with notice, and hence against another grantee of his own grantor.

We apprehend that this is not an accurate view of the principle of privity. It is true that in the old law a feoffee was considered to be in privity with his feoffor;[1] but this was because of the feoffee's *tenure* and of the right of the lord to fealty and service. The estoppel upon the feoffee was much like that upon a tenant now; and it may be doubted whether it continued long after the incidents of the feudal tenure became obsolete. But however this may be, the relation of grantor and grantee is for most purposes held antagonistic. Thus, in Osterhout *v.* Shoemaker[2] Mr. Justice Bronson says: 'Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor; and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation express or implied that he will at some time or in some event surrender the possession. The grantee in fee is under no such obligation. . . . He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.' And so it is held in Blight *v.* Rochester,[3] Averill *v.* Wilson,[4] and in other cases.[5]

It is true that this doctrine applies to the case of the acquisition of an outstanding title on the part of the grantee; and it is also true that where both parties to a contest for land claim from the same common title *only*, each may in a rather loose sense be said to be estopped to deny the other's title.[6] But this rule prevails where the common title is identical, and where the grantee has no other to rely upon.[7] Thus, in Ives *v.* Sawyer the plaintiff brought ejectment against the defendant, the plaintiff claiming as devisee of one under whom she showed the defendant to claim by a defective deed; and the defendant having no other title was rightly estopped from setting up the

[1] Coke, Litt. 352 a.

[2] 3 Hill, 513.

[3] 7 Wheat. 535.

[4] 4 Barb. 180.

[5] See ante, pp. 345, 357. Compare also the well-settled doctrine that an assignee of a mortgage taken for value and without notice takes clear of all secret claims against the assignor. Vredenburgh *v.* Burnet, 31 N. J. Eq. 229.

[6] Murphy *v.* Barnett, 1 Car. L. Rep. 106; Ives *v.* Sawyer, 4 Dev. & B. 52; Den d. Love *v.* Gates, ib. 363; Den d. Johnson *v.* Watts, 1 Jones, 228; Carver *v.* Jackson, 4 Peters, 1, 83.

[7] Collins *v.* Bartlett, 44 Cal. 371.

plea that the ancestor of the devisor had no title. And the case was similar in Douglass *v.* Scott, so often cited.

The case under consideration is different because the parties, though claiming from a common source, do not claim by the same title; the first grantee claiming by a deed executed before the grantor had either title or seisin, and the second by a deed executed after he had acquired both. Besides, in Ives *v.* Sawyer the reason of the defendant's defeat was that his deed was defective; had his conveyance been perfect in form, he must have prevailed without trying to impeach the ancestor's title. Nor in the present case does the second grantee seek to impeach the grantor's title; his own claim requires him to uphold it. He seeks to show that, as his grantor is admitted to have had no title when the first deed was executed, the first grantee took nothing under it.

The difference between a purchaser (without notice) and an heir claiming under the grantor only is manifest. The latter is bound as a privy because he gets the estate without cost; and it is right, therefore, that he should stand in the situation of his ancestor. A purchaser, however, pays value for the estate; and while he acquires no better title than his grantor *appears* to possess, he may well be considered (and in general is by the law considered) as freed from the effect of any secret obligations relating to the property by which his grantor may be bound.[1] In other words, the land or its equivalent in value should stand for the liabilities of the owner (grantor). The heir takes it without putting anything in its place; hence it is subject in his hands to the burdens of the ancestor. The grantee puts an equivalent in its place; hence it is not necessary or just that the land should be bound in his hands, unless he purchased with notice. In a word, the heir *represents* the ancestor and continues *his* estate; a purchaser does *not* represent his vendor. It is sufficient protection to one who has been so rash as to purchase before the grantor has a title, that he may call upon his grantor to make a further assurance upon acquiring title, or, if too late for this, that he may maintain an action upon the

[1] The view of the text is borne out by such cases as Fairchild *v.* McArthur, 15 Gray, 526, and Foster *v.* Wightman, 123 Mass. 100. See ante, p. 345, note 3.

covenants of his deed. It is certain that a purchaser without notice is not bound by an estoppel in *pais* resting on his vendor;[1] the estoppel in such a case is not a conveyance. It would be difficult to draw a sound distinction between the two estoppels.

But while we reach the conclusion that a conveyance by one having neither title nor seisin cannot operate against a subsequent purchaser whose deed is executed after title is obtained, the situation of the grantee of a disseisor who had no title is very different. Such a case comes within the terms of the Statute of Uses, and the grantee acquires a legal estate, though by wrong. And if the grantor should afterwards acquire title, and then make a new conveyance, the second grantee would take nothing of which he could avail himself; not on the ground that the new title directly passed to the first grantee, for that could no more be effected in this case, it would seem, than in the other. The true reason is that the grantor has now no seisin out of which to serve a use in the second grantee; and the Statute of Uses, therefore, cannot operate to give him a legal estate. Nor could he recover the land in the name of his grantor, for his grantor is estopped by his previous deed. Besides, the second conveyance being executed while another is in adverse possession is void against him and those claiming under him under the champerty law.[2]

We have thus attempted to show that our modern assurances with warranty do not possess the efficacy of the ancient feoffment in respect of after-acquired estates. But there is another difference which is worthy of note. At common law there was probably no case in which the donor was precluded from setting up a subsequent interest where he could not be met by a rebutter; the ground of which was the prevention of a circuity of action. The estoppel, it is true, indicated the direct passing of the after-acquired estate; but there was always connected with it this doctrine of rebutter. At the present day there are

[1] Thistle *v.* Buford, 50 Mo. 278, 281; Shaw *v.* Beebe, 35 Vt. 204; Snodgrass *v.* Ricketts, 13 Cal. 359; Dukes *v.* Spangler, 35 Ohio St. 119, 126; Farrar *v.* Farrar, 4 N. H. 191; Trull *v.* Skinner, 17 Pick. 213.

[2] 3 Washb. Real Prop. 293.

many instances of estoppel upon grantors where there can be no rebutter. Mr. Rawle mentions five classes of cases of this kind, to wit: 1. Where the question has arisen between the assignees of the original title and the assignees of that subsequently acquired. 2. Where a married woman has been held (as she has in some states [1]) to be estopped by joining with her husband in the covenants of the deed. 3. Where the grant is made by the state; the courts generally holding that the state will be estopped by the covenants, though not liable to an action upon them.[2] 4. Where the covenantor has been adjudged a bankrupt; in which case it is held that although his discharge in bankruptcy may be a release from liability on his contracts, yet he will be precluded by his covenants from asserting title.[3] 5. Where the covenants are barred by limitation.[4] 'Another case may be mentioned, to wit, where the consideration of the grant with warranty was love and affection only, the contest being between the grantee and a subsequent purchaser, and the grantor making no claim.[5]

In none of these cases is there any right of action; and therefore the doctrine of rebutter cannot be applied. But it does not follow that future estates directly pass in such cases. In most of the cases under the foregoing heads the point was not necessarily raised. The question was between grantor and grantee or their privies, while almost the only way that the point could arise (upon a conveyance for value) would be in a contest between purchasers before and after title acquired. Between grantor and grantee for value it is well enough in a mere contest for the new estate to say that it inures and passes to the

[1] Ante, pp. 339, 340.

[2] But see ante, p. 341.

[3] Rawle, Covenants, 401–403, 4th ed.; Gregory *v.* Peoples, 80 Va. 355, 357; Bush *v.* Person, 18 How. 82.

[4] Cole *v.* Raymond, 9 Gray, 217.

[5] Robinson *v.* Douthit, 64 Texas, 101. There a father conveyed to his son with warranty upon the consideration above stated. The father had previously created an encumbrance upon the land which, after the grant to his son, was bought in by a third person and then acquired by the father. The defendant was a purchaser of the premises from the father with notice of the deed to the son. It was held that the title derived from the discharge of the encumbrance inured to the son, against the claim of the purchaser. Clearly this result would not have followed in a contest between the father and the son. Warranty in a voluntary conveyance could not rebut the warrantor; rebutter requires a warranty in *nature* enforceable.

grantee.[1] It might as well be so in such a case; the grantor would be no worse off, the grantee no better.

The only case of the five which this explanation will not reach is the first. That is the case we have been considering in the main in the preceding pages; and we have endeavored to show that the new title passes to a subsequent purchaser without notice. And Mr. Rawle, upon a learned examination of the subject in another way, reaches the same conclusion.[2] So does the American editor of Smith's Leading Cases in his notes to the Duchess of Kingston's Case.[3]

It should be added also that the covenants considered in many of the cases coming within the above-mentioned category were covenants for title merely, such as seisin and right to convey. Now, it would seem that covenants of this kind, so far as the question of estoppel is concerned, are of no greater effect than a specific recital of the facts. The only difference is that by putting the statement of facts into the form of a contract there arises a right of action for the breach. The covenant in reality is only a recital with an agreement to respond in case of its falsity.

§ 6. *Personal Property.*

The question has been raised whether the doctrine of title by estoppel is applicable in the case of a simple sale of personal property; and though it has been held to be so applicable by the Supreme Court of the United States[4] and by the courts of South Carolina[5] and of New York,[6] strong opinion has been expressed the other way.[7] Mr. Baron Parke doubted the doctrine in Bryans *v.* Nix;[8] and the American editors of Smith's Leading Cases[9] add that the law that no interest can pass either

[1] But not for general purposes. See ante, p. 413, note.

[2] Rawle, Covenants, 427 et seq., 4th ed.

[3] 2 Smith's L. C. 720, 6th Am. ed.

[4] Gottfried *v.* Miller, 104 U. S. 521, patent; Faulks *v.* Kamp, 17 Blatchf. 432, same; Curran *v.* Burdsall, 20 Fed. Rep. 835, same; Littlefield *v.* Perry, 21 Wall. 205, though there was no warranty.

[5] Frazer *v.* Hilliard, 2 Strob. 309. See Moore *v.* Byrum, 10 S. Car. 452, 463.

[6] Gardiner *v.* Suydam, 7 N. Y. 357, 363. See Kimberly *v.* Patchin, 19 N. Y. 330, 339.

[7] 2 Smith's L. C. 742, 6th Am. ed.

[8] 4 Mees & W. 775, 794.

[9] Supra.

in lands or chattels which is not vested at the time when it is granted or sold would be futile if its operation could be evaded by construing the mere grant or sale as an estoppel.[1] It may now, however, be considered that the weight of authority is in favor of the estoppel wherever there is a sufficient warranty or recital. It is clear, as we have said, that a purchaser without notice is not bound by an estoppel resting on his vendor.[2]

[1] If a man agrees to sell personal or real property not yet acquired by him, equity will, when he acquires it, enforce his agreement to convey it. Holroyd *v.* Marshall, 10 H. L. Cas. 191, 211, Lord Westbury. So of mortgages of personalty to be acquired. Ib.; Mitchell *v.* Winslow, 2 Story, 630. The American authorities upon the latter subject are very numerous and not altogether in harmony; but they are not treated as belonging to the law of title by estoppel. That is a matter of the courts of law as well as of equity.

[2] Ante, p. 444.

CHAPTER XII.

RELEASE OF DOWER.

THE rule that a party shall not be permitted to dispute his deed applies to the case of a married woman who relinquishes her right of dower in the lands of her husband;[1] though a widow may of course set up any title she may have or acquire distinct from dower, if her deed was merely a release of dower.[2] Nor is it necessary that the wife should release her dower in the same instrument by which the husband's estate is conveyed. In the case of Stearns *v.* Swift the wife had joined with her husband 'in token of her relinquishment of dower,' when in fact the husband had previously parted with all his interest in the premises to the grantee in the present deed; and this deed contained no words of grant on the part of the wife. The court held that she was estopped to claim dower. Mr. Justice Wilde said that it was no valid objection to the operation of the deed on the part of the wife that her husband had no right or title to the land at the time of its execution. It was not essential that the sale by the husband, and the relinquishment of dower by the wife, should be made by the same deed, or at the same time.[3] Nor was it any objection that the deed of the wife was a mere release, without words of grant; for release of dower always operated by way of estoppel, not by way of grant.

Where the husband conveys his *wife's* land in his own name only, and the wife merely affixes her signature and seal to the deed in token of relinquishment of all her right in the bargained

[1] Stearns *v.* Swift, 8 Pick. 532; Farley *v.* Eller, 29 Ind. 322; Usher *v.* Richardson, 29 Maine, 415. That the wife is not estopped to claim dower without a release of the same, even though she join with the husband in the deed, see Lothrop *v.* Foster, 51 Maine, 367. Nor is a husband estopped to claim curtesy in his wife's lands by having consented to her devising the same. Roach *v.* White, 94 Ind. 510.

[2] McLeery *v.* McLeery, 65 Maine, 172.

[3] Fowler *v.* Shearer, 7 Mass. 14.

premises, she is not estopped to claim the land after her husband's death.[1] Chief Justice Shaw in the case cited said that by law and usage the deed of the husband and wife conveying the wife's estate had been deemed sufficient;[2] but it had also been steadily held that to have this effect the wife must have joined in the deed; that is, it must appear that both husband and wife were parties to the efficient and operative parts of the instrument of conveyance, and that it was not sufficient that her name was annexed as expressing her assent to the act of her husband, without words expressing her formal participation in the granting part of the deed.[3] The case does not stand upon the footing of A's witnessing a conveyance of his own land made by B as B's land.[4] On the other hand, if a second husband join his wife in conveying lands of the first husband, the wife will be estopped to claim dower in right of her first marriage.[5] But in general, where the husband's deed is inoperative, the wife's release of dower works no estoppel.[6]

The question was considered by the Supreme Court of Ohio in Woodworth *v.* Paige[7] whether a wife who releases dower in a deed made without consideration, and to defraud her husband's creditors, is estopped to claim dower against a purchaser for a valuable consideration from the grantee. The case did not turn upon this point; but the court examined the question, and expressed the opinion that there was no estoppel. This view is not without support;[8] but there are serious difficulties in the way of it. It is not the same case at all as the case of a contest between the widow and the husband's creditors; in such a contest it is clear that the widow must prevail,[9] because the

[1] Bruce *v.* Wood, 1 Met. 542.

[2] Doane *v.* Willcutt, 5 Gray, 328, 332; ante, p. 340. The husband's covenants, of course, will not estop the wife to claim any after-acquired estate. Thompson *v.* Merrill, 58 Iowa, 419.

[3] Lithgow *v.* Kavenagh, 9 Mass. 161; Powell *v.* Monson & M. Co., 3 Mason, 347; Lufkin *v.* Curtis, 13 Mass. 223; Raymond *v.* Holden, 2 Cush. 264.

[4] Post, chapter 18, § 2; Hale *v.* Skinner, 117 Mass. 474.

[5] Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Usher *v.* Richardson, 29 Maine, 415.

[6] Blain *v.* Harrison, 11 Ill. 387; Hoppin *v.* Hoppin, 96 Ill. 265.

[7] 5 Ohio St. 70.

[8] Lockett *v.* James, 8 Bush, 28.

[9] Robinson *v.* Bates, 3 Met. 40; Richardson *v.* Wyman, 62 Maine, 280; Malloney *v.* Horan, 49 N. Y. 111; Porter *v.* Lazear, 109 U. S. 84; Morton *v.* Noble, 57 Ill. 176; Mattill *v.* Baas, 89 Ind. 220.

statutes against conveyances in fraud of creditors do not enlarge the creditors' rights. Creditors of the husband could not take property of the wife, nor will her joining in her husband's fraud make the matter different. But in a contest with the husband's grantee, the ordinary principle may well apply; the widow is estopped against her own releasee;[1] the release does not operate indeed by grant, at common law, in any case, but it operates as effectually by estoppel.[2]

[1] Of course, after the death of her husband, her act of conveying in fee with warranty will estop her to claim dower or homestead. Reeves *v.* Brooks, 80 Ala. 26; Jones *v.* Reese, 65 Ala. 134; Mattock *v.* Lee, 9 Ind. 298; Grant *v.* Parham, 15 Vt. 649. So of fraudulent acts by her. Knox *v.* Higginbotham, 75 Ga. 699.

[2] The subject is further considered in 2 Bigelow, Law of Fraud, 65–67, in press. If fraud was practised on the wife by the grantee, the case would be different. Ib. p. 67.

PART III.

RIGHTS ARISING FROM ESTOPPEL IN PAIS.

PART III.

RIGHTS ARISING FROM ESTOPPEL IN PAIS.

CHAPTER XIII.

PRELIMINARY VIEW.

ESTOPPEL in pais arises (1) from contract, (2), independently of contract, from act or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged;[1] and it designates some present or past fact[2] fixed by or in virtue of the contract, or of the act or conduct in question.[3]

This statement would not have suited the estoppel in pais of the earlier common law. The following acts created the estoppel of Sir Edward Coke's time: Livery (of seisin), entry, accept-

[1] Ante, p. 3. See Gray *v.* Gray, 83 Mo. 106; Yates *v.* Hurd, 8 Col. 343, 349. In these cases the definition given in the third edition of this work was adopted, to wit: 'An estoppel by matter in pais may be defined as an express or implied admission, become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position.' But that is cumbrous, and the term 'admission' is not suited to all kinds of estoppel in pais, as e. g. to the case of waiver; chapter 18, § 7.

[2] See ante, pp. 3, 143. Hence, as a rule, it cannot bind after-acquired interests. Mowatt *v.* Castle Steel Co., 34 Ch. D. 58; East Alabama R. Co. *v.* Tennessee R. Co., 78 Ala. 274. But this may possibly be different in a case analogous to title by estoppel in virtue of a recital. See ante, pp. 396, 397; also pp. 446, 447, as to personalty.

[3] It is believed to be safer to describe than to define estoppel in pais in the fluctuating condition of the law relating to the subject.

ance of rent, partition, and the acceptance of an estate.[1] These acts in pais possessed the same conclusive effect as the estoppel by record or by deed. The feoffment itself at first, or rather the livery of seisin by which that conveyance was effected, was an act in pais, and possessed a higher effect as an estoppel than the deed which was employed to perpetuate its existence or to transfer a reversion in the same land when held by a tenant of the feoffor.[2] But verbal conveyance was terminated by the Statute of Frauds. The estoppel arising in cases of partition has already been considered;[3] estoppel by entry has become obsolete, at least in America; and aside from the case of partition, only one of the instances mentioned by Coke, estoppel by acceptance of rent, prevails at the present day. And of this it is important to remark that its character is widely different from what it was in the time of Coke.[4] Estoppel by the acceptance of rent, as known to Coke, occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed.[5] Such an estoppel depended upon the prior existence of a deed; while at the present day it is immaterial how the tenure arose, as will hereafter appear.

Indeed, the estoppel in pais of the present day has grown up almost entirely since the time of Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times, though the old lines are often visible in the newer pathways. Thus, by analogy to the rule that a tenant shall not dispute the title of his landlord (and even this rule did not prevail in Coke's day;[6] the only estoppel of a tenant being by virtue of a deed, as we shall see), an estoppel has been introduced in the case of bailment, which forbids a bailee, in general terms, to dispute his bailor's title. Other cases of a similar character have arisen; while still others, wholly unlike any of the estoppels of the older law, have come into existence, even

[1] Inst. 352 a.

[2] 2 Smith's L. C. 742, 6th Am. ed.

[3] Ante, pp. 409, 410.

[4] 5 American Law Review, p. 1 (October, 1871). A valuable article upon the Estoppel of a Tenant to deny his Landlord's Title, by Mr. Joseph Willard of the Boston bar.

[5] 2 Black. Com. 209; 3 Black. Com. 175.

[6] Moffat *v.* Strong, 9 Bosw. 57, 65, per Woodruff, J.; Duke *v.* Ashby, 7 Hurl. & N. 600, 602, Pollock, C. B.

within living memory. In no part of the law, indeed, are activity and growth more manifest than in this branch of our subject; nowhere is the expansiveness of the common law seen to better advantage.

The whole subject, as we have intimated, is modern, and, rejecting most of the old nomenclature, may be considered under two or three heads having modern names. One class of cases is designated in this work as Estoppel by Contract, a term which is intended to embrace (1) all cases in which there is an actual or virtual undertaking to treat a fact as settled, so that it must stand specifically as agreed, and (2) all cases in which an estoppel grows out of the performance of the contract by operation of law. Whether all the cases here referred to ought to be called estoppels is now probably too late to inquire, for it would be vain to resist the current. Much of it must certainly have fallen without the lines of estoppel as laid down by Coke; how some of it, had it arisen, would have been disposed of, is not clear. The truth appears to be that the requirements of modern society could not have been expressed in the terms of the old law, and the bands had to be unloosed. Estoppel by Contract will be the first division to be considered. It should be observed, however, that this head does not include cases of estoppel not arising by or by virtue of the contract itself, though arising in the course of the contract; if the estoppel is no part of the contract itself, or of its legal effect, it belongs to the next head. This next head, which constitutes a most important addition in recent times to the law of estoppel, embraces the class of cases known and herein designated as Estoppel by Conduct; the estoppel arising without regard to contract, or rather the fact to be taken as true not being necessarily or ordinarily the subject or the effect of contract. At the present day no subject is more constantly before the courts. What would have been done at law in Sir Edward Coke's time with a case like Pickard *v.* Sears [1] — where the owner of goods permitted the property to be sold as another's [2] — does not appear. Probably upon the attempt of the owner to recover the property in trover or in detinue the defendant would have had recourse to the

[1] 6 Ad. & E. 469.

[2] See chapter 18.

chancellor to stay the plaintiff's hand; or perhaps he would have gone there in the first instance upon discovering the fraud and rescinding the contract. At any rate, the estoppel at law for such cases appears to have been unknown. A learned judge has said that this estoppel was a device of the common-law courts, worked out through the system of special pleading, to strengthen and lengthen the arm of the law judges, and so to enable them to do what the Court of Chancery had always done unaided.[1] This will be the second subject for consideration, and will complete the substantive law of estoppel in pais proper.

Besides these two classes of cases, the doctrine, or at least the name, of estoppel has been extended during the present century, and especially within thirty or forty years past, to a variety of cases, embraced in the present work under the heads of Election, and Inconsistent Positions, herein called Quasi-Estoppel, and following the two subjects before mentioned. There are cases too in which the term appears to have been used merely for convenience, as equivalent to 'bar.' Such need not be considered. Indeed, in regard to many modern cases it may be doubtful whether anything more has been done than to add a new name to subjects already worked out upon grounds of their own, however nearly those may resemble the grounds of admitted estoppels of the present time. But it must always be understood that such cases stand upon their own grounds, so far as these are distinctive. Thus, in the case of waiver of rights, which is often called a case of estoppel by conduct, the ground upon which the waiver rests is, at least in ordinary cases, knowledge by *both* parties of the facts; it is not to be supposed that by calling the case 'estoppel by conduct' knowledge of the facts on the part of the one claiming the waiver is fatal,[2] as in the typical example of estoppel by conduct, to wit, misrepresentation of some fact.[3]

This is enough to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel.[4] Neither

[1] Bacon, V. C. in Keate *v.* Phillips, 18 Ch. D. 560, 577.

[2] See post, chapter 18, § 7.

[3] In that the waiver, when binding, operates specifically, and not in the alternative of damages, the effect of an estoppel is produced.

[4] See e. g. Aldrich *v.* Billings, 14

the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is a legal consequence — a right — arising from acts or conduct; while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e. not as yet attended with full legal consequences. The most that acquiescence or ratification can do, and this either may under certain circumstances do, is to supply an element necessary to the estoppel, and otherwise wanting, as e. g. knowledge of the facts at the time of making a misrepresentation.[1] But each stands upon its own grounds, and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct.

Again, there are cases of agency which are sometimes put as estoppels that are not properly such. Thus, the rule that one who has left with another his signature to an incomplete mercantile instrument or other contract — that is, with a blank to be filled — is bound by the act of that person, in completing the instrument, has been called an estoppel.[2] Estoppel by conduct broadly this cannot be, for the principal's conduct in trusting the agent is not, or may not be, in the other's change of position, or in immediate connection with it, as it must be for an estoppel.[3] Nor is there any false representation, the only other kind of estoppel the case could fall under. On the contrary, there is a true representation, to wit, of agency; and the only question is how far the agency ought to extend. That is not estoppel, but agency, pure and simple; the agent has only exceeded his instructions. That is the legal view of the case, however gross the abuse. On the other hand, where the principal's act or omission in the agency is in, or in immediate connection with, the very change of position by the person dealing

R. I. 232, 239; Sheldon Hat Co. *v.* Eichmeyer Hat Co., 90 N. Y. 607, 614; McCreary *v.* Parsons, 31 Kans. 447, 451; Vallette *v.* Bennett, 69 Ill. 632; and other cases in chapter 21, at the end.

[1] See chapter 18, § 3.

[2] See e. g. Jewell *v.* Rock River Paper Co., 101 Ill. 57.

[3] Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389; Swan *v.* North British Co., 2 Hurl. & C. 175, 182, Exch. Ch.; Arnold *v.* Cheque Bank, 1 C. P. D. 578; Seton *v.* Lafone, 19 Q. B. D. 68, C. A. affirming 18 Q. B. D. 139; Merchants of the Staple *v.* Bank of England, 21 Q. B. D. 160, C. A.; Vagliano *v.* Bank of England, 22 Q. B. D. 103, 117; affirmed 23 Q. B. D. 243, C. A. This subject will be further considered in a subsequent chapter.

with the agent, and is the proximate cause of such change, there may be an estoppel against the principal from denying effect even to a forgery by the agent.[1] So, again, to hold one out as agent, and then attempt to deny the agency altogether, is (after some one has acted upon the representation) another thing; that is a case of estoppel. The result in this particular case is of course the same; but where there is danger of confusion, things should be called by their right names.[2] It may be observed in this connection that estoppel by misrepresentation or concealment of title was at first argued at the bar, and perhaps considered by the bench, as resting on agency;[3] but that view never gained acceptance.[4]

[1] Cases in note 3, p. 457.

[2] Even purchase for value without notice has been called estoppel. Grimes v. Taft, 98 N. Car. 193, 198.

[3] Pickard v. Sears, 6 Ad. & E. 469.

[4] See note (a), near the beginning of chapter 18.

A. *ESTOPPEL BY CONTRACT.*

CHAPTER XIV.

FACTS AGREED OR ASSUMED.

§ 1. *The general Principle.*

THE first class of cases under the head of Estoppel by Contract, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or by defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law.[1] In other words, supposing the contract to be lawful and binding, the party or parties (it may be one, it may be all) pledging or justly assuming the fact in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the real terms of agreement.

The rule may be illustrated by two or three examples. Thus, dealing with a person on the footing that he occupies a particular position or character, it may be as administrator, execu-

[1] As to illegal contracts see Brightman *v.* Hicks, 108 Mass. 246; Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464; Dupas *v.* Wassell, 1 Dillon, 213; Langan *v.* Sankey, 55 Iowa, 52; Shorman *v.* Eakin, 47 Ark. 351, 354; Klenk *v.* Knobel, 37 Ark. 304; Webb *v.* Davis, ib. 555. The Arkansas cases were cases of recitals and covenants held contrary to public policy, and hence as not creating any estoppel.

tor, trustee, director, agent, or holder of any manner of office, will estop that person, generally speaking, to deny the fact agreed or assumed in regard to his position or character.[1] So a contract based upon one's having a certain title to property will estop the parties, or the party pledging the fact if it be the act of but one,[2] in the performance of the contract, from claiming a different title.[3] And so accepting and treating an article in shipment as baggage may estop owner and carrier from treating it as freight.[4]

The estoppel in this class of cases is fixed by the execution of the contract; nothing further need be shown, where the fact in question is clearly agreed or assumed. The question, then, will be whether the fact has been so agreed; where, in the intention of the parties or in contemplation of law, it has not been, something more than the execution of the contract will be necessary for the estoppel. Acknowledgment of receipt of money or of a commodity, in a contract (to be considered later), may be a case of the kind.

On the other hand, this class of estoppels being founded upon contract, it can seldom be an answer to the alleged estoppel, unlike the case of estoppel by conduct, that the party supposed to be estopped acted in ignorance of the facts and under mistake. There are some exceptions, it is true, but they appear to belong mainly to those cases in which the fact in question turns upon some act done in pursuance of the contract, — as in the case of delivery of possession to a tenant constituting the ground of the tenant's estoppel, — in distinction from an agreement of the fact itself.

[1] See State *v.* Spaulding, 24 Kans. 1, 11; State *v.* Stone, 40 Iowa, 547; Du Val *v.* Marshall, 30 Ark. 230; Hill *v.* Huckabee, 52 Ala. 155; Riddle *v.* Hill, 51 Ala. 214; Meyer *v.* Wiltshire, 92 Ill. 395; Floyd Co. *v.* Morrison, 40 Iowa, 188; Oakland Paving Co. *v.* Rier, 52 Cal. 270; McClure *v.* Commonwealth, 80 Penn. St. 167; Morris *v.* State, 47 Texas, 583; Central Railroad *v.* Henderson, 69 Ga. 715; Campbell *v.* Trunnell, 67 Ga. 518; Imboden *v.* Etowah Mining Co., 70 Ga. 86.

[2] See Stroughill *v.* Buck, 14 Q. B. 781; ante, p. 369.

[3] Welsch *v.* Belleville Bank, 94 Ill. 191.

[4] Hoeger *v.* Chicago Ry. Co., 63 Wis. 100. For other examples of the general rule see Perdue *v.* Brooks, 85 Ala. 459, usury; Gayle *v.* Johnson, 80 Ala. 388; Cothran *v.* Brower, 75 Ga. 494, agreement as to issues; Fourth National Bank *v.* Olney, 63 Mich. 58, authority; State *v.* Anderson, 16 Lea, 321.

Such is the general rule, and its meaning. But there may be a question further back, for thus far the existence of a valid contract has been assumed. In general, either party may show that the contract is invalid; but may this rule of law itself be subject in any case to the law of estoppel? May the parties, or either of them, be estopped to show some fundamental fact or law, at variance with the fact or law agreed or assumed as necessary to the transaction, which fundamental fact or law, if it could be shown, would invalidate the contract?[1] This question touches mainly the law relating to corporations, to which we now turn.

§ 2. *Corporations.*

What we shall have to say now will concern mainly the question of the existence and powers of a corporation; for where there is no dispute concerning the existence of the corporation or its power to perform the particular contract, but the sole inquiry is whether an act or a representation has generated an estoppel, the decision of the case must turn upon the principles of estoppel by conduct, of which later. And in regard to corporations it may at the outset be observed that there is no radical[2] distinction between municipal and private bodies or individuals so long as the act in question is not in any form ultra vires.[3] What, however, is ultra vires 'in any form' remains to be seen.

First, then, concerning the question whether a body of men contracting as a corporation can dispute their existence as such before the law, and so defeat the contract. This question may arise in at least two ways: first, in the way of an attempt to

[1] That is, some fundamental fact in the beginning, as distinguished from ratification or appropriating the benefits of the contract. As to that see the chapter on Election, post.

[2] There is perhaps one of degree. The doctrine of acts ultra vires is, no doubt, applied with greater strictness to municipal than to private corporations. Newbery v. Fox, 37 Minn. 141, 143.

[3] See e. g. Bank v. Flour Co., 41 Ohio St. 552; Union Depot Co. v. St. Louis, 76 Mo. 393; New Haven R. Co. v. Chatham, 42 Conn. 465; Society for Savings v. New London, 29 Conn. 192; Chicago Ry. v. People, 91 Ill. 251; Martel v. East St. Louis, 94 Ill. 67; Roby v. Chicago, 64 Ill. 447; Chicago R. Co. v. Joliet, 79 Ill. 39; Logan Co. v. Lincoln, 81 Ill. 156; Curnen v. New York, 79 N. Y. 511; Calhoun v. American Emigrant Co., 93 U. S. 124, 130.

deny that any act of incorporation has ever been granted to the body; secondly, in the way of an attempt to deny the validity of a charter of incorporation issued under a real act of the legislature, as e. g. on the ground that that act was unconstitutional.

The first form of the question does not often arise, and what is to be said on authority remains to be seen. Ordinary corporations are certainly the creatures of statute purely; there can be no such thing without statute. But a non-existing thing can be treated as existing to the extent of creating an estoppel to deny its existence, as in the familiar case of a false representation or warranty of title by the vendor of land, or of the false assumption of the character of executor or the like;[1] and supposing that the assumption of incorporation is not a violation of statute, there may be ground enough for believing that the assumption may be such as to estop the body. Direct stipulation that the body has received a charter from the legislature would perhaps make such a case.[2]

The doubt applies only to ordinary corporations; that is, to commercial, religious, and eleemosynary corporations. Counties and towns are deemed corporations at common law in many of the states; and certainly in such states it never could be alleged (if it could anywhere be alleged) by way of defence to an action against the municipality that it had never been incorporated by the legislature. It should be added that a third person, as e. g. one assuming to act for a supposed corporation, will be estopped probably in any case to deny the truth of the representation expressed or implied in holding out the corporate existence of a body to an innocent person, who has been induced thereby to deal upon that footing.[3]

Supposing, on the other hand, that an act of incorporation (where one is necessary) has been obtained, we are brought to the more common question whether a body assuming to act under chartered authority has the right to deny the legality of its existence as a corporation in an action to enforce liability dependent upon such existence. In answer to this it may be laid

[1] Supra, p. 460.

[2] See Rikhoff *v.* Brown's Sewing Machine Co., 68 Ind. 388.

[3] See Corwith *v.* Culver, 69 Ill. 502.

down with reference to cases of contract that the bar of estoppel appears to prevail whenever a body, assuming according to the mode prescribed by law to be a public or a private corporation, attempts to set up any defect in the steps towards its organization, required by law, against a party who had no notice of such defect when the contract was made.[1] Thus, in Dooley *v.* Cheshire Glass Co. the defendants in an action of contract attempted to set up in defence the falsity of the certificate of their organization filed according to the requirement of law; but the court refused to hear them. It was declared that by placing the certificate upon the records the officers were precluded from disputing its truth against an innocent person. A further objection by the defendants, that there had been no such publication of the certificate as the statute required, was also disregarded by the court.

The right of the party with whom a supposed corporation has contracted, to escape liability upon his engagement by denying the legal existence of the body, is a different thing. This appears to be permitted only when it is shown to be of the essence of the contract that the body should be a lawful corporation.[2] In ordinary cases it is not allowed an individual to escape an obligation by showing the incapacity of the other party to the contract to act as he has assumed to act. We have elsewhere seen that this is a broad rule of law;[3] and ordinarily it is quite as true of persons liable in contract to corporations as in other cases. In whatever form a person may have contracted with a de facto corporation, at least where the contract is not in itself entirely beyond the powers of the corporation,[4] whether the contract is by subscription to stock, by promissory note, by bond, mortgage, or otherwise, he will be estopped when sued thereon by the corporation to allege the plaintiff's non-existence before the law at the time of the agreement,[5] except in the unusual

[1] Dooley *v.* Cheshire Glass Co., 15 Gray, 494; Lehman *v.* Warner, 61 Ala. 455; Sherwood *v.* Alvis, 83 Ala. 115; McCarthy *v.* Lavasche, 89 Ill. 270; Barboro *v.* Occidental Grove, 4 Mo. App. 429; Attorney-Gen. *v.* Simonton, 78 N. Car. 57; Hagerman *v.* Ohio Building Assoc., 25 Ohio St. 186. But see Boyce *v.* Methodist Church, 46 Md. 359.

[2] Lehman *v.* Warner, 61 Ala. 455.

[3] See infra, p. 465.

[4] This limitation is held necessary in Alabama. Sherwood *v.* Alvis, 83 Ala. 115, and cases cited.

[5] There are many illustrations. See

case above mentioned, or where there was fraud in securing recognition as a corporation.[1] A corporation may in general be required to show its legal existence preliminary to its right to sue in the courts, but that is done as against the defendant (which is of course enough for the particular case) by showing the contract.[2]

On the other hand, one not a party to a contract with a corporation except by force of law may, it seems, dispute the legal existence of the body.[3] A fortiori may one sued in an action of tort by a body professing to be an ordinary corporation require proof of the plaintiffs' incorporation and dispute the legality of the acts constituting the supposed corporate existence. But it probably would not be enough in this or in any other case to show that certain preliminary steps not of the essence of the legal organization of the body were omitted. Indeed, what would be enough to show the invalidity of the organization, especially where it has been recognized by the courts or by the state as a legal body, must always be a question of difficulty where there is no specific declaration of statute. It may be added that just as the existence of a supposed corporation may be denied by a defendant sued for a tort, so may the supposed corporation show its non-existence when itself sued for a tort.

Next, with regard to the question of the right to deny the power of a lawful corporation to do an act which it has assumed to do, concerning which a distinction must be noticed similar

Close *v.* Glenwood Cem., 107 U. S. 466, 477; Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464; Lehman *v.* Warner, 61 Ala. 455; Cahall *v.* Citizens' Building Assoc., ib. 232; Marion Bank *v.* Dunkin, 54 Ala. 471; Eaton *v.* Aspinwall, 19 N. Y. 119; Franklin *v.* Twogood, 18 Iowa, 515; Broadwell *v.* Merritt, 87 Mo. 95; Butchers' Bank *v.* McDonald, 130 Mass. 264; Commissioners *v.* Bolles, 94 U. S. 104; McLaughlin *v.* Citizens' Building Assoc., 62 Ind. 264; Massey *v.* Building Assoc., 22 Kans. 624. See also Phœnix Warehouse Co. *v.* Badger, 67 N. Y. 294; Stoutimore *v.* Clark, 70 Mo. 471; National Ins. Co. *v.* Bowman, 60 Mo. 252; St. Louis *v.* Shields, 62 Mo. 247; Nashua Ins. Co. *v.* Moore, 55 N. H. 48; Wilks *v.* Georgia R. Co., 79 Ala. 180, 187; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 254.

[1] Doyle *v.* Mizner, 42 Mich. 332.

[2] Lehman *v.* Warner, supra; Sherwood *v.* Alvis, 83 Ala. 115. More may be required where there is no contract between the parties, showing the incorporation. Savage *v.* Russell, 84 Ala. 103, contract rescinded.

[3] Marion Bank *v.* Dunkin, 54 Ala. 471.

to the one just under consideration. A corporation may in many cases deny its power to do what it has undertaken when the opposite party could not make such denial. A man cannot set up the incapacity of the party with whom he has contracted in bar of an action by that party for breach of the contract. Legal disability generally, as e. g. in the case of an infant,[1] is a defence personal to him who is under it, and cannot be made use of by another.[2] The case of a corporation, not prohibited by law to do the act in question, makes no exception;[3] one sued

[1] Kendall *v.* Titus, 9 Heisk. 727.

[2] The principle is general that one cannot set up a defence which is personal to another, except in cases in which agreement or public policy permits. See e. g. Swann *v.* Wright, 110 U. S. 590. It was there held that if a party purchase property under a decree reciting the sale to be subject to liens operating against bondholders, already judicially established or afterwards to be established in a certain way, he cannot afterwards dispute the validity of such liens, while retaining the property, by showing that fraud was practised in obtaining them. That is a matter for the bondholders.

[3] Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464, where the ground taken in the text is directly upheld (though reversed on other grounds. 130 U. S. 1). 'The law,' said the court, 'is well settled that a person who contracts with an apparent corporation as such is estopped, when sued on such contract, to say that the plaintiff had no corporate existence or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defence its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defence to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defence personal to the party who is under it, and cannot be taken advantage of by another.' Deady, J. at p. 477, citing Cowell *v.* Springs Co., 100 U. S. 61, and the text, supra. See also Branch *v.* Jesup, 106 U. S. 468, 481.

But if the contract of the supposed corporation was not only unauthorized but absolutely prohibited by law and therefore illegal, such fact may, it seems, be shown when the corporation seeks to enforce the contract. Oregonian Ry. Co. *v.* Oregon Ry. Co., at p. 479; Semple *v.* Bank, 5 Sawy. 93.

It may very well be too that a person who has dealt with a corporation upon the footing of statutory power in the corporation to do an act may show, when the corporation seeks to enforce its supposed powers against him in the matter, that the statute authorizing the transaction was unconstitutional. South Ottawa *v.* Perkins, 94 U. S. 200, 267; Tone *v.* Columbus, 39 Ohio St. 281. Public policy requires that an act of the legislature which is in contravention of the constitution should be shown to be so as soon as may be, before serious consequences have resulted; and cases which declare that a man may be estopped to show such a fact should be scrutinized, to see if the decision is not to be confined within very narrow limits. Of cases of the kind see Mœtz *v.* Detroit, 18 Mich. 526; Ferguson *v.* Landram, 5 Bush, 230; s. c. 1 Bush, 548; Tone *v.* Columbus, 39 Ohio St. 281, conceding with Counterman *v.* Dublin, 38 Ohio St. 515, 517, and South Ottawa *v.* Perkins, 94 U. S. 200, 267, that the general rule is against the estoppel. Benefits received and retained

in contract by the body cannot say that the corporation had no lawful existence or power to make the contract,[1] unless it was prohibited by law to make it, or unless it was stipulated that the bargain should be off in case it should turn out that the corporation was acting ultra vires, or unless there was fraud on the part of the body in this particular.

The more important question is, When if at all may a corporation itself, not the opposite party, repudiate its undertaking by alleging that the undertaking was without its powers? Confusion among the earlier authorities will be found in the answer given to this question; nor are the recent cases in perfect harmony. It appears, however, to be agreed by the better authorities of the present time that if the act undertaken was in and of itself ultra vires of the corporation, no act of the body can have the effect to estop it to allege its want of power to do

may make an exception. See, further, chapter 21.

[1] Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464; Cowell *v.* Springs Co., 100 U. S. 61; Close *v.* Glenwood Cem., 107 U. S. 466, 477; Whitney *v.* Robinson, 53 Wis. 309; Manufacturing Co. *v.* Montgomery, 74 Mo. 101; French *v.* Donohue, 29 Minn. 111; Franklin *v.* Twogood, 18 Iowa, 515; Pancoast *v.* Travelers' Ins. Co., 79 Ind.,172; Smelser *v.* Wayne Turnpike Co., 82 Ind. 417; Hasselman *v.* United States Mortg. Co., 97 Ind. 365; Dooley *v.* Wolcott, 4 Allen, 406; Brouwer *v.* Appleby, 1 Sandf. 158; St. Louis Gas Co. *v.* St. Louis, 84 Mo. 202; Father Matthew Soc. *v.* Fitzwilliams, ib. 406; Imboden *v.* Etowah Mining Co., 70 Ga. 86; Helena *v.* Turner, 36 Ark. 577; Central Agric. Assoc. *v.* Gold Ins. Co., 70 Ala. 120; Estey Manuf. Co. *v.* Runnels, 55 Mich. 130; First National Bank *v.* Gillilan, 72 Mo. 77; Branch *v.* Jesup, 106 U. S. 468, 481; Teutonia Bank *v.* Wagner, 33 La. An. 732; Latiolais *v.* Citizens' Bank, ib. 1444; Black River R. Co. *v.* Clarke, 25 N. Y. 208; Eaton *v.* Aspinwall, 19 N. Y. 119; Dutchess Cotton Manuf. Co. *v.* Davis, 14 Johns. 238; McBroom *v.* Lebanon, 31 Ind. 268; Eppes *v.* Mississippi R. Co., 35 Ala. 33; Worcester Med. Inst. *v.* Harding, 11 Cush. 285; Congregational Soc. *v.* Perry, 6 N. H. 164; Cochran *v.* Arnold, 58 Penn. St. 399; Ray *v.* Indianapolis Ins. Co., 39 Ind. 290; Lucas *v.* Greenville Assoc., 22 Ohio St. 339; Frost *v.* Frostburg Coal Co., 24 How. 278. The rule in regard to ultra vires appears to be contra in Alabama. Chambers *v.* Falkner, 65 Ala. 448; Montgomery *v.* Montgomery Plank Road Co., 31 Ala. 76; Marion Bank *v.* Dunkin, 54 Ala. 471. But the reasoning is insufficient. The estoppel applies there to the question of existence. Central Agric. Assoc. *v.* Gold Ins. Co., 70 Ala. 120. Whether one who has participated in the formation and business of a corporation de facto is not estopped to deny the incorporation of the company, quære. Whipple *v.* Parker, 29 Mich. 369. See Swartwout *v.* Mich. Air Line R. Co., 24 Mich. 389, holding that there may be such an estoppel; Wheelock *v.* Kost, 77 Ill. 296. Dealing with an agent as such may work a like estoppel. Campbell *v.* Trunnell, 67 Ga. 518; Central Railroad *v.* Henderson, 69 Ga. 715.

what was undertaken.[1] The powers of the ordinary corporation being dependent upon the statute which created the body, those powers cannot of course be enlarged by the body itself; and the act in question being in itself ultra vires, the corporation cannot make it otherwise whether directly or indirectly.[2] Thus, if the issuance of municipal bonds was without the powers of the municipality, the fact that citizens stood by and saw them sold to bona fide purchasers for value, and that the corporation afterwards recognized the act of issuance as binding, will not estop it to deny the legality of the bonds in whose hands soever it may be sought to enforce them.[3] Nor will recitals in the bonds, of the power of the corporation to issue them, work an estoppel.[4] Nor will the payment of taxes to meet interest on the bonds have the effect of an estoppel in such a case.[5] However, if a contract with a corporation has been performed in good faith by the other party, and the corporation has received the benefits thereof, it probably cannot interpose against its duties assumed thereunder the defence of ultra vires,[6] as e. g. that the statute creating the charter was unconstitutional.[7] Perhaps the corporation could still show that its act was a direct violation of statute.[8]

[1] Fairtitle *v.* Gilbert, 2 T. R. 169; In re Companies Acts, 21 Q. B. D. 301; Daviess *v.* Dickinson, 117 U. S. 657; ante, p. 349.

[2] McPherson *v.* Foster, 43 Iowa, 48; Schaeffer *v.* Bonham, 95 Ill. 368; South Ottawa *v.* Perkins, 94 U. S. 260; Anthony *v.* Jasper, 101 U. S. 693, 697; Northern Bank *v.* Porter, 110 U. S. 608, 618.

[3] McPherson *v.* Foster, supra.

[4] Northern Bank *v.* Porter, 110 U. S. 608. See Carroll *v.* Smith, 111 U. S. 556; Boyce *v.* Methodist Church, 46 Md. 359; Lake *v.* Graham, 130 U. S. 674.

[5] Schaeffer *v.* Bonham, supra.

[6] Ward *v.* Johnson, 95 Ill. 215, 240; Darst *v.* Gale, 83 Ill. 141; Thomas *v.* Citizens' Ry. Co., 104 Ill. 462; Peoria R. Co. *v.* Thompson, 103 Ill. 187; Louisville R. Co. *v.* Flanagan, 113 Ind. 488, 493; Daniels *v.* Tearney, 102 U. S. 415, 420; Railway Co. *v.* McCarthy, 96 U. S. 267; San Antonio *v.* Mehaffy, ib. 312; Hitchcock *v.* Galveston, ib. 351; Morris R. Co. *v.* Railroad Co., 29 N. J. Eq. 452; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Texas Ry. Co. *v.* Gentry, 69 Texas, 625. See Bliss *v.* Keweah Canal Co., 65 Cal. 502. And comp. the rule in equity in regard to infants. Goodman *v.* Winter, 64 Ala. 410, 437; Commonwealth *v.* Sherman, 18 Penn. St. 346. But a corporation having paid money on a contract which it has afterwards found to be ultra vires may, it seems, rescind and recover back the money. Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316, 327; Northwestern Packet Co. *v.* Shaw, 37 Wis. 655.

[7] See McDonnell *v.* Alabama Ins. Co., 85 Ala. 401, as to the stockholders' attempt to deny such constitutionality; Daniels *v.* Tearney, 102 U. S. 415, 420, 421.

[8] Swann *v.* Miller, 82 Ala. 530, 537.

If, on the other hand, the undertaking was within the general scope of the powers of the corporation, the question will generally be one of agency. If the other contracting party had no knowledge or notice[1] that the corporation acted without taking all the steps required by its charter or by-laws, the defence, it is generally held, of irregularities and omission of requirements is not open.[2] And the same appears to be true where the power in question is germane to other power given to the corporation by statute.[3] Nor could the corporation say that a person held out as having authority to sign its bonds, though the holding out consisted only in allowing him to sign them, had no authority to act in that way.[4]

Often, however, the case is strengthened by some representation on the part of the corporation, to the effect that the necessary steps have been taken to make the contract conform to the requirements of law. When this is the case, and the representation is a clear, distinct statement,[5] the corporation, like an in-

[1] Where bonds show on their face that they were issued before the time when the law authorizing them took effect, the holder has fatal notice, for he is bound to know the law authorizing the execution of the bonds. McClure *v.* Oxford, 94 U. S. 429. See Northern Bank *v.* Porter, 110 U. S. 608, 618; Bissell *v.* Spring Valley, ib. 162.

[2] In re Romford Canal Co., 24 Ch. D. 85; Webb *v.* Herne Bay Comrs., L. R. 5 Q. B. 642; Anthony *v.* Jasper, 101 U. S. 693, 697; Northern Bank *v.* Porter, 110 U. S. 608, 618; Gaus *v.* Chicago Ry. Co., 60 Wis. 12; Merchants' Bank *v.* State Bank, 10 Wall. 604, 644; Commonwealth *v.* Reading Bank, 137 Mass. 431, 440; Eminence *v.* Grasser, 81 N. Y. 52; Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542; Home Ins. Co. *v.* Sherwood, 72 Mo. 461; Schaeffer *v.* Bonham, 95 Ill. 368. The New York cases are contra. See infra, p. 469, note 2. Nor perhaps will the rule of the text apply to preclude a supposed corporation, when sued upon a contract by it, from showing that it has never become a corporation; for in that case its power to make the contract may be wanting altogether. See Boyce *v.* Methodist Church, 46 Md. 359. A corporation doing business in a state other than that which created it will be estopped when sued there to say that it has no authority to do business in such state. Clay Ins. Co. *v.* Huron Salt Co., 31 Mich. 346.

[3] West *v.* Menard Agr. Board, 82 Ill. 205; Chicago Building Assoc. *v.* Crowell, 65 Ill. 453.

[4] Weyauwega *v.* Ayling, 99 U. S. 112. See Oakland Paving Co. *v.* Rier, 52 Cal. 270.

[5] That of course is essential. School District *v.* Stone, 106 U. S. 183. In this case bonds issued by a school district of Iowa recited that they were 'issued by the board of school directors by authority of an election of the voters of said school district held on the thirty-first day of July, 1869, in conformity with the provisions of ch. 98 of acts 12th General Assembly of the state of Iowa.' The constitution of the state limits indebtedness of school districts to an amount not exceeding five per cent on the value of their taxable property. The

dividual, will be estopped, if the transaction was not beyond its powers, in favor of an innocent person who has acted upon the representation, to deny the truth of the statement.[1] This subject has found frequent illustration in actions upon municipal bonds. In these cases it has been repeatedly laid down by the Supreme Court of the United States, by state courts, and in England, that a bona fide purchaser for value, without notice of any defect in the steps preliminary to the execution of the bonds, is not bound to look further than to see that the municipality had legislative authority, and that (when required by statute) the officers authorized have decided that the conditions to issuing the bonds have been fulfilled.[2] And in such a case a recital upon the bonds that the necessary conditions have been performed is sufficient to estop the municipality as against such a holder.[3]

court held that the recital did not import a compliance with the law; it implied nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity to the statute. The statute, it was said, might have been pursued in regard to the time and place and manner of election, and yet the law might have been disregarded in respect to the limitation of indebtedness. The court conceded that this might be a somewhat strict construction of the recital, but declared that construction ought to be strict when it was proposed by mere recitals on the part of officers of a municipal corporation to exclude inquiry whether bonds issued in its name were made in violation of the constitution.

[1] But as to representations in regard to its own incorporation, see Boyce *v.* Methodist Church, 46 Md. 359. That may be a very different thing.

[2] New Providence *v.* Halsey, 117 U. S. 336; Block *v.* Commissioners, 99 U. S. 686; Hackett *v.* Ottawa, ib. 86; Cromwell *v.* Sac, 96 U. S. 51; Carroll *v.* Smith, 111 U. S. 556; Sherman *v.* Simons, 109 U. S. 735; Insurance Co. *v.* Bruce, 105 U. S. 328; Northern Bank *v.* Porter, 110 U. S. 608; Coloma *v.* Eaves, 92 U. S. 484; Buchanan *v.* Litchfield, 102 U. S. 278; Knox County *v.* Aspinwall, 21 How. 539; Cotton *v.* New Providence, 47 N. J. 401; Mutual Benefit Ins. Co. *v.* Elizabeth, 42 N. J. 235. Contra, Starin *v.* Genoa, 23 N. Y. 439; In re Sharp, 56 N. Y. 257; Cagwin *v.* Hancock, 84 N. Y. 532; Ontario *v.* Hill, 99 N. Y. 324. And see Steckett *v.* East Saginaw, 22 Mich. 104; Tone *v.* Columbus, 39 Ohio St. 281, 298; post, chapter 19.

[3] Cases last cited; also Lake *v.* Graham, 130 U. S. 674, 681; Orleans *v.* Platt, 99 U. S. 676, 682; Lyons *v.* Munson, ib. 684; Menasha *v.* Hazard, 102 U. S. 81; Buchanan *v.* Litchfield, ib. 278; Tipton *v.* Locomotive Works, 103 U. S. 523; Harter *v.* Kernochan, ib. 562; Jasper *v.* Ballou, ib. 745; San Antonio *v.* Mehaffy, 96 U. S. 312; Coloma *v.* Eaves, 92 U. S. 484; Kenicott *v.* Supervisors, 16 Wall. 452; Moultrie *v.* Savings Bank, 92 U. S. 631; Marcy *v.* Oswego, ib. 637; Rogers *v.* Burlington, 3 Wall. 654; Moran *v.* Miami County, 2 Black, 722; Knox Co. *v.* Wallace, 21 How. 546; Bissell *v.* Jeffersonville, 24 How. 287. See, further, Mercer County *v.* Hacket, 1 Wall. 83;

It appears unnecessary to the estoppel, in the absence of statute, that the bonds should contain any recital of the performance of the preliminary steps or conditions by the corporation;[1] enough that the holder has taken for value and without notice bonds which the corporation had the power to issue. But no recital will work an estoppel if the act in question was wholly beyond the powers of the corporation; and if part of the bonds issued were within the corporate power, and part beyond, the latter will not be made good by recital.[2]

The estoppel applies as well against the stockholders of the corporation as against the corporation itself, where the act is within the powers of the body. Thus, a stockholder cannot allege informalities in the issue of stock, which the corporation had power to issue;[3] but such person may object to an increase of stock not authorized at all by law. Even acquiescence of a stockholder would not bind him in such a case.[4] Again, if a municipal corporation is estopped to question its bonds, tax-payers will be estopped.[5]

Gelpcke *v.* Dubuque, ib. 175; Meyer *v.* Muscatine, ib. 384; Von Hostrup *v.* Madison, ib. 291; Cincinnati *v.* Morgan, 3 Wall. 275; Eminence *v.* Grasser, 81 Ky. 52; In re Romford Canal Co., 24 Ch. D. 85; Webb *v.* Herne Bay Comrs., L. R. 5 Q. B. 642; Fountaine *v.* Carmarthen Ry. Co., L. R. 5 Eq. 316.

[1] See Brooklyn *v.* Insurance Co., 99 U. S. 362; Weyauwega *v.* Ayling, ib. 112.

[2] Daviess *v.* Dickinson, 117 U. S. 657.

[3] Scovill *v.* Thayer, 105 U. S. 143, 149; Upton *v.* Tribilcock, 91 U. S. 45; Chubb *v.* Upton, 95 U. S. 665; Pullman *v.* Upton, 96 U. S. 328.

[4] Scovill *v.* Thayer, supra.

[5] See Thatcher *v.* People, 98 Ill. 632, where a tax-payer was held estopped to question the validity of the proceedings of a municipality, by assisting in the passing of a vote for the execution of bonds, though notice of the meeting was defective. Cases of that kind are considered in chapter 21. As to acts of the officers of municipal corporations, see Sturgeon *v.* Hampton, 88 Mo. 203; St. Louis Ry. Co. *v.* Belleville, 122 Ill. 376; Rush Co. *v.* State, 103 Ind. 497; Union School Township *v.* First National Bank, 102 Ind. 494.

CHAPTER XV.

ACKNOWLEDGMENT OF RECEIPT.

PARTIES may by apt terms of contract bind themselves not to question an acknowledgment of receipt of money; that is, they may bind themselves specifically, and not merely in the alternative of damages, to the admission. But such things are not common. And that an acknowledgment of receipt of money or commodities, not clearly agreed in the writing to be binding as a contract[1] or as the basis of a contract, is not generally conclusive evidence between the parties of the fact stated is well settled.[2] The case first cited was an action by partners on a bill of exchange. The defendant in proof of payment gave in evidence a receipt. The receipt was in the name of the firm, and had been written by Farrar, one of the partners. The plaintiffs, however, contended that it had not been given bona fide, but procured for the purposes of the cause. The question was

[1] See Hoeger *v.* Chicago Ry. Co., 63 Wis. 100.

[2] For a variety of illustrations see Farrar *v.* Hutchinson, 9 Ad. & E. 641; Skaife *v.* Jackson, 3 Barn. & C. 421; Graves *v.* Key, 3 Barn. & Ad. 313; Bowes *v.* Foster, 2 Hurl. & N. 779; Megargel *v.* Megargel, 105 Penn. St. 475; Van Ness *v.* Hadsell, 54 Mich. 560; Marco *v.* Fond du Lac Co., 63 Wis. 212; Baker *v.* Union Ins. Co., 43 N. Y. 283; Sheldon *v.* Atlantic Ins. Co., 26 N. Y. 460; Insurance Co. of Penn. *v.* Smith, 3 Whart. 520; Pitt *v.* Berkshire Ins. Co., 100 Mass. 500; Miller *v.* Brooklyn Ins. Co., 2 Big. 35, 757. But see Teutonia Ins. Co. *v.* Anderson, 77 Ill. 384; Illinois Ins. Co. *v.* Wolf, 37 Ill. 354; Providence Ins. Co. *v.* Fennell, 49 Ill. 180; Goit *v.* National Ins. Co., 25 Barb. 189; Young *v.* Mutual Ins. Co., 4 Big. 1. But Goit *v.* National Ins. Co. was overruled by Baker *v.* Union Ins. Co., supra; and the statement in Young *v.* Mutual Ins. Co. was only a dictum. There is, however, convincing force in the distinction taken in this case, and in the case from 25 Barb. (see also Southern Ins. Co. *v.* Booker, 9 Heisk. 606; Peck *v.* Vandenberg, 30 Cal. 23; Ashley *v.* Vischer, 24 Cal. 322), between the effect of an acknowledgment of receipt as a simple receipt for money, and as constituting part of a contract. 'In the first aspect,' says the court in Young *v.* Mutual Ins. Co., 'and for collateral purposes, such as the recovery of the money, the acknowledgments may be contradicted. In the second, and for the purpose of defeating the operation of the contract, they cannot be contradicted.'

left to the jury, and a verdict was returned for the plaintiffs. A motion for a new trial was overruled.[1] Indeed, such acknowledgment is held not conclusive even though appended to the record of a judgment, so long as it forms no part of the judgment.[2]

In another case Mr. Baron Martin said that Alner *v.* George, just referred to in the note, was not law.[3] The case before the learned baron was an action of trover. It appeared that the plaintiff being in difficulty, and fearing his creditors, had agreed with the defendant, a creditor, that there should be a pretended sale of his goods to him. An invoice was accordingly made out and a receipt given to the defendant for the sum stated to be the purchase-money, and possession was given the defendant. The plaintiff was allowed to recover.[4]

The case of Graves *v.* Key,[5] above cited, was an action on a bill of exchange, on which was written a receipt for the full amount. In point of fact the money had not been paid by the acceptor or by the drawer, but had been paid by a person who had simply purchased the bill. The plaintiff recovered.[6]

[1] Lord Denman, who delivered the judgment, now said: 'Mr. Cresswell cited Alner *v.* George, 1 Camp. 392; but that case is not directly applicable. There no doubt existed that the receipt had been really given by the party whose claim it affected; but it was alleged that third persons who had an interest in the demand were injured by the transaction. Lord Ellenborough held that the receipt was nevertheless binding. Here the objection is that the receipt, though signed by one of the firm for whom it is given, is a fraud upon the rest. In Benson *v.* Bennett, 1 Camp, 394, note . . . a receipt signed by the plaintiff was produced by the defendant, but he was proved to have obtained it from the plaintiff by deception, and therefore it was held not binding. It appears to us that in all cases a receipt signed by a party and produced afterwards to affect him is evidence, but evidence only, and capable of being explained.'

[2] Lapping *v.* Duffy, 65 Ind. 229.

[3] Bowes *v.* Foster, 2 Hurl. & N. 779.

[4] Mr. Baron Martin said: 'In Alner *v.* George Lord Ellenborough said that a receipt in full was an estoppel; and if that be so, there would be an estoppel here. But I apprehend that case is not law. The distinction between a receipt and a release has been long established. The fact of a release must be pleaded and put on the record. A receipt cannot be pleaded in answer to the action; it is only evidence on a plea of payment; and where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made; for how can a jury find that payment was made when it was proved that none was ever made?'

[5] 3 Barn. & Ad. 313.

[6] Lord Tenterden said: 'We all think upon full consideration that the action is maintainable. It is not necessary for us to say what the effect of

This doctrine has recently been considered in the Court of Appeals of New York.[1] The case cited was an action on a life-insurance policy. Acknowledgment of receipt of the premium, contrary to the fact, was embodied in and indorsed on the policy; but this was held only prima facie evidence of payment. In this case there was the additional circumstance of the ignorance of the plaintiff, to whom the policy was made payable, of the fact of non-payment, and it was contended that she was thrown off her guard by the receipt, and might herself have paid the premium at the proper time and saved the policy; but the circumstance was held immaterial. In the Superior Court of New York this had been held an estoppel.[2]

Acknowledgment of receipt of premium in a policy of marine insurance forms an admitted exception to this rule, for reasons peculiar to the transaction by which it is made; and ordinarily the acknowledgment is conclusive of the fact stated.[3] So other receipts may when acted upon, without knowledge of the facts,[4] by third persons estop the party giving them to deny their purport.[5] Bickerton *v.* Walker was to the following effect: A mort-

these indorsed memoranda of receipts would be, supposing that it were incompetent for the plaintiff to contradict or explain them by parol evidence; because it seems to us that the plaintiff may by law give such contradiction or explanation, and that in this case the parol evidence does satisfactorily explain the last memoranda made on each security, and shows distinctly that the balance was not paid by either Almon or the defendants. A receipt is an admission only; and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence except as to the person who may have been induced by it to alter his condition. A receipt may therefore be contradicted or explained.'

[1] Baker *v.* Union Ins. Co., 43 N. Y. 283.

[2] 1 Big. 595.

[3] See Arnould, Insurance, 180, 181, 4th ed. The rule arises from the method of keeping the accounts between the broker and the assured. See ib. 179.

[4] If the party acting has knowledge, actual or imputed, there will be no estoppel. Marco *v.* Fond du Lac Co., 63 Wis. 212.

[5] Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111; Griswold *v.* Haven, 25 N. Y. 595; Miller *v.* Sullivan, 26 Ohio St. 630; Carr *v.* Miner, 42 Ill. 179; People *v.* Reeder, 25 N. Y. 302; Knights *v.* Wiffen, L. R. 5 Q. B. 660; Bickerton *v.* Walker, 31 Ch. D. 151, C. A.; Rice *v.* Rice, 2 Drew. 73; Turner *v.* Flinn, 72 Ala. 532. See Winsmith *v.* Winsmith, 15 S. Car. 611. But the party claiming the estoppel must be justified in acting upon the receipt, and the party giving must have intended or have had reason to suppose that it would be acted upon. Kuhl *v.* Jersey City, 8 C. E. Green, 84.

gaged goods to B for £250, acknowledging receipt of that sum in the mortgage deed, and signing a receipt therefor indorsed upon the mortgage. Soon after, B transferred the mortgage to C for the full value of £250, C taking the same without notice that A had not in fact received the amount named. It was held that A could not claim against C that he had not received from B £250.[1]

A case of the same nature was recently decided by Mr. Justice Miller of the Supreme Court of the United States, on the circuit.[2] It appeared that the defendants had given a warehouse receipt to Upham & Co. for eight hundred bushels of wheat. Upham agreed with the plaintiffs to sell them a larger quantity of wheat, and in part execution of this agreement assigned to the plaintiffs the above-mentioned receipt. The plaintiffs thereupon presented the receipt to the defendants and demanded the wheat; and being refused they brought the present action. The defendants offered to prove that they had never received the wheat from Upham & Co., and that they had no such wheat as that mentioned in the receipt, but that they had issued the receipt as a security for money loaned. The evidence was held inadmissible.[3] The decision is supported by many other au-

[1] It had been contended that the assignee of the mortgage had been guilty of negligence in not making inquiry in regard to the matter, according to what appears to be the usual course of things, of the mortgagor. To this Lord Justice Fry said: 'In the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment or some information from him as to the state of the accounts between mortgagor and mortgagee. The reason of this course of conduct is, however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage. . . . But in the present case the assignment was made very soon after the execution of the mortgage and before the time of payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage, he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.'

[2] McNeil *v.* Hill, Woolw. 96.

[3] 'Instruments of this kind,' said the court, referring to bills of lading and warehouse receipts, 'are sui generis. From long use in trade they have

thorities;[1] but in some cases the defendant has been held entitled to show that the receipt was given by mistake, as in relation to facts which he could not know,[2] and in other cases of doubtful soundness.[3]

To the same class of cases belongs the acknowledgment of receipt in bills of lading; prima facie evidence of the fact recited, of the receipt of the property, in the first instance,[4] the

come to have among commercial men a well-understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale.' Austin *v.* Craven, 4 Taunt. 644; Whitehouse *v.* Frost, 12 East, 614; White *v.* Wilks, 5 Taunt. 176; Conard *v.* Atlantic Ins. Co., 1 Peters, 386; Gardiner *v.* Suydam, 7 N. Y. 357; Gibson *v.* Chillicothe Bank, 11 Ohio St. 311. When a warehouseman issues such a receipt, he puts it into the power of the holder to treat with the public on the faith of it. He enables him to say and to induce others to believe that he has certain property which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt so as to injure a party who has been misled by it. This is within the most exact definition of estoppel. If A gives to B his note for $100, although he has received no value therefor and may defend against the note in a suit brought by B, yet if B sells the note to a third party who does not know of the facts, A then must pay the note. Just so in the case of a warehouse receipt. If A issues such a paper to B, for articles which he has never received, a third party treating with B on the faith of the statement and promise contained in the receipt will hold A for the goods or their value. It is of no consequence what the transaction may be between the original parties, whether the receipt, as is claimed here, was intended as a security for a loan or was entirely false.'

[1] Rowley *v.* Bigelow, 12 Pick. 307, 314; Armour *v.* Michigan Central R. Co., 65 N. Y. 111 (doubting Grant *v.* Norway, 18 C. B. 665); Van Santen *v.* Standard Oil Co., 81 N. Y. 171; Brooke *v.* New York R. Co., 108 Penn. St. 529; Hale *v.* Milwaukee Dock Co., 29 Wis. 482; Davis *v.* Russell, 52 Cal. 611, 616; Coventry *v.* Great Eastern Ry. Co., 11 Q. B. D. 776, C. A.

[2] See Hale *v.* Milwaukee Dock Co., supra.

[3] Williams *v.* Wilmington R. Co., 93 N. C. 42; Second National Bank *v.* Walbridge, 19 Ohio St. 419. See Blanchet *v.* Powell's Co., L. R. 9 Ex. 74. As this is a case of estoppel by contract, the situation should be exceptional in which mistake can be an answer to the estoppel. The subject is considered again in connection with misrepresentation, in §§ 3 and 5 of chapter 18. The case is often treated as one of purchase for value of a title tainted with fraud. If the purchase is without notice, the right of the defrauded party is cut off. See e. g. Michigan Central R. Co. *v.* Phillips, 60 Ill. 190; Western Union R. Co. *v.* Wagner, 65 Ill. 197; Hide and Leather Bank *v.* West, 20 Bradw. 61. But see Burton *v.* Curyea, 40 Ill. 320; Solomon *v.* Bushnell, 11 Oreg. 277. The doctrine of purchase for value applies to equities, and there is no equity here. Estoppel in pais by *contract* appears to be the better ground.

[4] Berkley *v.* Watling, 7 Ad. & E. 29; Witzler *v.* Collins, 70 Maine, 290; Hastings *v.* Pepper, 11 Pick. 43; Nelson *v.* Woodruff, 1 Black, 156.

acknowledgment in the bill becomes, by the weight of authority, conclusive in favor of one who has acted upon it in good faith, by changing his position materially, without notice of any error.[1] It does not make the bill of lading or the warehouse receipt negotiable (the common objection) to allow the estoppel;[2] it only makes one particular admission, as in other cases, binding after it has misled some one. Negotiability is a much more sweeping doctrine than that. The plaintiff must at the outset show that he has purchased for value without notice; and it must appear that the representation, in connection with the nature or situation of the property, was such that the defendant ought to have known the facts and that the plaintiff might well have been misled.

Under circumstances too which would create an estoppel by conduct, an acknowledgment of receipt of money or property will become binding even between the parties;[3] as in the case of a receipt given to an attaching officer, with knowledge, for goods attached as the property of a third person, whereby the officer is prevented from levying upon other goods and induced to leave those attached in the possession of the receiptor.[4] And as we have already intimated, contract that an acknowledgment of receipt is true, or contract based upon the truth of such an acknowledgment, will work an estoppel.

Again, it has long been settled, though after considerable conflict of authority, that the ordinary acknowledgment of receipt of consideration in a *deed* is not conclusive between the parties,[5] since it is not to be understood that they have con-

[1] See the cases cited supra, p. 475, note, on both sides of the question.

[2] In Rowley *v.* Bigelow, 12 Pick. 307, 314, it is said that the bill of lading is *quasi* negotiable, which is well enough.

[3] See Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464, 488.

[4] Dewey *v.* Field, 4 Met. 381; Dezell *v.* Odell, 3 Hill, 215; Dresbach *v.* Minnis, 45 Cal. 223; Bleven *v.* Freer, 10 Cal. 172; Gaff *v.* Harding, 66 Ill. 61; Roswald *v.* Hobbie, 85 Ala. 73, 77. See Bullard *v.* Hascall, 25 Mich. 132; post, p. 567.

[5] See e. g. Shephard *v.* Little, 14 Johns. 210; McCrae *v.* Purmort, 16 Wend. 460; Barter *v.* Greenleaf, 65 Maine, 405; Miller *v.* Goodwin, 8 Gray, 542; Mobile Ry. Co. *v.* Wilkinson, 72 Ala. 286; Houston *v.* Blackman, 66 Ala. 559; Carmack *v.* Lovett, 44 Ark. 180; Irvine *v.* McKeon, 23 Cal. 472.

tracted that the statement shall be binding. In point of fact the acknowledgment is considered a mere formal matter, having no special significance. But the courts did not directly reach the conclusion that the statement could for all purposes be disputed. The first step was to hold that the statement of *payment* was not conclusive. In Shephard *v.* Little, just cited, the plaintiff sued for money had and received. At the trial he offered to prove that, being possessed of a lease of the value of $500, and that, being in debt to a third person in a smaller sum, he borrowed of the defendant the amount of the debt, giving him an assignment of the lease, which the defendant was to sell, paying over the surplus to the plaintiff. The assignment was by deed, and stated the consideration to be $500 in hand paid. The defendant objected to the admissibility of the evidence against the acknowledgment, but the Supreme Court held it proper; taking a distinction, based on prior decisions,[1] between an attempt to disprove the amount stated to have been paid, and an attempt to show a different consideration from the one declared by the deed. And some courts still refuse to go further than this.[2]

Most of the courts, including the courts of New York, have, however, taken a second step, and allowed the parties to prove an altogether different consideration from that expressed in the deed.[3] Thus, in the case of McCrae *v.* Purmort,[4] before the Court of Errors of New York, the consideration in a deed of lands was alleged to be money paid, and the court allowed evidence to show that instead of money the consideration paid was iron.[5]

[1] See Maigley *v.* Hauer, 7 Johns. 341.

[2] See cases reviewed in Houston *v.* Blackman, 66 Ala. 559.

[3] Irvine *v.* McKeon, 23 Cal. 472; Coles *v.* Soulsby, 21 Cal. 47.

[4] 16 Wend. 460.

[5] Mr. Justice Cowen, who delivered the judgment, after showing that there had been much conflict on the subject both in New York and elsewhere, said: 'A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right or to be the exclusive evidence of a contract it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations. And by anal-

In Massachusetts it has also been held from an early day that the acknowledgment of receipt of the consideration in a deed is not conclusive, but may be explained or denied.[1] The case first cited was an action by the grantor of land against the grantee to recover a part of the consideration money, the whole of which was expressed to have been paid; and the court sustained the action. The Chief Justice said that this was a merely formal part of the deed, and that it received so little attention that to consider it conclusive would be unjust. Moreover, a receipt was always open to explanation; and though the acknowledgment in the present case had been made under seal it was nothing more than a receipt, for the seal gave it no additional solemnity.[2]

There can be little doubt that this is the true view. It is not the correct way of putting the effect of a deed to say that a consideration is conclusively presumed between the parties; that way of putting the case was an after-thought of the judges, adopted so as to meet the supposed requirements of the law after the doctrine of consideration had been added to the English law. But the truth is, that neither consideration nor anything of the kind ever was necessary in the case of a deed; and

ogy the acknowledgment in a deed that the consideration had been received is not conclusive of the fact. This is but a fact; and testing it by the reason of the rule which we have laid down, it may be explained or contradicted. It does not *necessarily* and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing right; but no receipt can have the effect of destroying per se any subsisting right; it is only *evidence* of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment, but it is the extinguisher itself. (*a*) The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal.'

[1] Wilkinson *v.* Scott, 17 Mass. 249; Gale *v.* Coburn, 18 Pick. 397; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431; Preble *v.* Baldwin, 6 Cush. 550; Clark *v.* Deshon, 12 Cush. 589; Paige *v.* Sherman, 6 Gray, 511; Miller *v.* Goodwin, 8 Gray, 542.

[2] See Rex *v.* Scammonden, 3 T. R. 474.

(*a*) 'In speaking of a written release as an extinguisher of itself I do not understand him to mean the releasing clause in a conveyance which usually accompanies an acknowledgment of the receipt of the money, but an absolute, separate, and distinct release.' Miller, J. in Stackpole *v.* Robbins, 47 Barb. 212.

the result, properly speaking, is that a mere acknowledgment of consideration received, forming no part of the contract, is only evidence, and hence may be qualified or disputed altogether. The acknowledgment in the deed can have no more effect than would an acknowledgment upon the back of the deed or upon a separate piece of paper.

In favor of, though not against, subsequent purchasers and creditors without notice, however, the recital of a consideration received may be conclusive;[1] as indeed it will be in any case where another has innocently acted upon it to his prejudice. A case has arisen in Pennsylvania which illustrates this latter qualification of the general rule.[2] It was an action of trespass quare clausum fregit. The facts were that the defendant agreed to convey the premises to the plaintiff provided a certain piece of land should be given to him (defendant) by his father by will. The bargain was consummated, and a deed given reciting the consideration as money paid; and the will desired was executed. The defendant offered to prove at the trial that no money passed, contrary to the terms of the deed; but he was not allowed to do so. The court said that the principle which governed the case was that where a vendor, without fraud or mistake, accepted the engagement of a third person for the consideration agreed on, and on the faith of such engagement acknowledged the receipt of the consideration, it was against equity that he should be permitted to defeat the operation of the grant by showing that the consideration was not paid. Between the vendor and the purchaser the consideration was to be treated as fully paid, and the vendor was estopped from denying it.

Indeed, it is not permitted a party to prove a different consideration from that named in his deed if such change would vary the legal effect of the instrument. Thus, the grantor of a deed, who acknowledges receipt of payment of the consideration, will not be allowed, it is held, to disprove that fact and so establish a resulting trust in himself.[3]

[1] Levering *v.* Shockey, 100 Ind. 558; Turner *v.* Flinn, 72 Ala. 632.

[2] McMullin *v.* Glass, 27 Penn. St. 151.

[3] Mobile Ry. Co. *v.* Wilkinson, 72 Ala. 286.

CHAPTER XVI.

COMMERCIAL PAPER.

In the further consideration of estoppels arising upon some fact agreed or assumed to be true, we have to call attention, first, to the admission of genuineness implied by the acceptance of a bill of exchange and by the indorsement of a bill of exchange or a promissory note; secondly, to the admission of capacity implied in the acceptance of a bill or in the making of a note; thirdly, to the certification of checks; and fourthly, to the case of a transfer by an indorser after his liability has been fixed. In these cases the fact in question is assumed as if it had been actually agreed.

§ 1. *Genuineness.*

First, then, of the admission of genuineness referred to. The acceptance and the indorsement of commercial paper give rise to an estoppel peculiar in kind, and as yet not fully developed, and therefore not clearly defined, on some of its sides. The doctrine stated in general terms is this, that the acceptance of a bill and the indorsement [1] of a bill or note are a conclusive admission in favor of a bona fide holder for value that the signature of

[1] By the general current of authority an indorser, though estopped in an action against himself to allege that the plaintiff could not maintain an action upon the paper against a prior party, may still give evidence in favor of such a party impeaching the validity of *his* engagement, supposing the plaintiff's right of action to depend upon the validity of the defendant's engagement. Jordaine *v.* Lashbrooke, 7 T. R. 601 (overruling Walton *v.* Shelley, 1 T. R. 296); Townsend *v.* Bush, 1 Conn. 260; Stafford *v.* Rice, 5 Cowen, 23; Williams *v.* Walbridge, 3 Wend. 415; Haines *v.* Dennett, 11 N. H. 180. Contra, Freon *v.* Brown, 14 Ohio, 482. In Massachusetts the indorser's testimony is received only when the plaintiff took the paper with notice, suing virtually as payee. Newell *v.* Holton, 10 Gray, 349; Fox *v.* Whitney, 16 Mass. 118. See also Clapp *v.* Hansom, 15 Maine, 345; Davis *v.* Brown, 94 U. S. 423; Bigelow's Bills and Notes, 174, 175.

the drawer in the one case, and of all the prior parties in the other, is genuine.

A near likeness to this estoppel is found in estoppel by misrepresentation;[1] but the likeness after all is superficial. Estoppel by misrepresentation does not require any contract; besides, in the present case there is no external misrepresentation — no representation beyond that necessarily involved in the contract itself — by which the other estoppel is characterized. But the situation here, as in the preceding chapter, is one of contract, and the subject is therefore allied to that from which we have just passed. Indeed, it is sometimes said that acceptance and indorsement are *warranties* of genuineness; but that appears to be doubtful. The better view is that these acts operate as estoppels by admission, as will be seen further on.[2] The difference is material; if the case rests on warranty, properly speaking, the acceptor or indorser cannot say that the holder took with notice of the want of genuineness, while the contrary is true if it rests upon estoppel.

The leading case upon the effect of accepting a bill of exchange is Price *v.* Neal.[3] This was an action on the case by Price to recover from Neal the amount paid to him on two bills of exchange, of which Price was drawee. One of the bills had been paid by Price without acceptance; the other was duly accepted and paid at maturity. Both bills had been forged. It was held that the action could not be maintained. Lord Mansfield said that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the *drawer's hand* before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it.[4] Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and bona

[1] Chapter 18.

[2] See Vagliano *v.* Bank of England, 23 Q. B. D. 243, 257, C. A. affirming 22 Q. B. D. 103; McKleroy *v.* Southern Bank, 14 La. An. 458; post, p. 491. See also chapter 19.

[3] 3 Burr. 1354.

[4] But where, by usage or agreement, such duty is devolved upon the holder, it is held that the case will be different. Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628. See National Bank *v.* Bangs, 106 Mass. 441. The point will be more fully noticed later in the chapter.

fide discounts it. The plaintiff lies by for a considerable time after he has paid the bills, and then finds out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value bona fide. It was a misfortune which had happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there was no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it was in the plaintiff and not in the defendant.[1]

That a like rule applies to an indorser appears from the case of the State Bank *v.* Fearing.[2] This was an action of assumpsit on a promissory note made by Charles Brown, payable to Thomas Jackson, Jr., and indorsed with the name of the payee and of the defendant. It was agreed that the signatures of Brown the maker, and of the defendant, the second indorser, were genuine, and that it could be proved, if the evidence were admissible, that the indorsement of the name of Jackson, the payee, was forged; that the note was presented by Brown to the plaintiffs for discount, in the usual course of business, and discounted by them for him; that both parties were ignorant of the forgery at the time; and that due notice was given of the non-payment of the note. The court held the evidence inadmissible.[3]

[1] A fortiori a person who admits that an acceptance is in his own handwriting, and thereby induces another to take the bill, is estopped to deny the genuineness of the acceptance. Leach *v.* Buchanan, 4 Esp. 226; Goodell *v.* Bates, 14 R. I. 65; infra, p. 492.

[2] 16 Pick. 533. See also Alleman *v.* Wheeler, 101 Ind. 141.

[3] Chief Justice Shaw, who delivered the opinion of the court, said: 'In general it is not necessary for the holder to prove the signature of any party prior to the party whom he sues. The reason seems to be obvious that the party defendant by his indorsement has admitted the ability and the signature of all prior parties. . . . The effect of the engagement of the indorser is that if the prior parties do not pay the note according to its tenor upon due presentment, upon notice to him he will. It is therefore a rule upon this subject that the plaintiff is under no obligation to prove the signature of those prior to the party intended to be charged. It is very different where he claims against the acceptor of a bill or maker of a note.

The acceptor of a bill of exchange is not estopped to deny the genuineness of an indorsement, even of the payee's name, on the paper at the time of acceptance if the indorsement was made after the paper had passed out of the drawer's hands; and money paid by the acceptor even to an innocent holder, under a forged indorsement, may be recovered if seasonable notice of the forgery be given.[1] Such a case was presented in Canal Bank *v.* Bank of Albany, just cited. The plaintiffs had paid to the defendants a draft drawn on them, payable to one Bentley, whose indorsement had been forged, and the defendants were innocent holders for value. The court held the plaintiffs entitled to recover the money.[2]

They respectively promise to pay to the payee or his order, and until he has made such order by his indorsement the plaintiff can establish no title, and to prove such order he must prove the genuineness of his signature.'

This doctrine concerning the right of an acceptor or indorser to deny the genuineness of the signatures of parties is firmly established in the law. Hortsman *v.* Henshaw, Bigelow's Bills and Notes, 541; s. c. 11 How. 177; Coggill *v.* American Bank, 1 Comst. 113; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Crichlow *v.* Parry, 2 Camp. 182; Story, Promissory Notes, § 380.

The rule applies to all prior signatures. Story, Promissory Notes, §§ 135, 387; Bills of Exchange, §§ 111, 225, 412. The question arose in MacGregor *v.* Rhodes, 6 El. & B. 266, whether an indorser could deny the indorsement to himself; and it was held he could not. 'The declaration alleges,' said Campbell, C. J. 'that Pinkney drew a bill payable to his order and indorsed it to the defendants, and that the defendant indorsed it to the plaintiff, and that it was presented and dishonored. The plea admits all these allegations except the allegation of the indorsement by Pinkney to the defendants. Are the defendants, who admit that they indorsed to the plaintiff, at liberty to deny that Pinkney indorsed to them? The issue would be idle. Whether Pinkney indorsed to the defendants in blank or specially, the fact of the indorsement by the defendants would at the trial be conclusive evidence of Pinkney's indorsement to them, and would estop them from showing what purported to be Pinkney's indorsement was a forgery. The request is to pay to the order of the payee. When a man indorses such a bill, he undertakes that if the party requested do not pay, he will; and he cannot deny that the payee has made the order.'

[1] Canal Bank *v.* Bank of Albany, 1 Hill, 287; Hortsman *v.* Henshaw, 11 How. 177; Beeman *v.* Duck, 11 Mees. & W. 251. See Bigelow's Bills and Notes, 567, 568.

[2] 'On the merits,' said Cowen, J. for the court, 'there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent. Chitty, Bills, 336, 7th Am. ed. And the act of payment could amount to no more. Ibid. Neither acceptance nor payment at any time, nor under any circum-

A different rule, however, prevails if the drawer of a bill put it into circulation with the name of the payee indorsed.[1] Hortsman *v.* Henshaw was such a case. Fiske and Bradford, a firm in Boston, drew their bill of exchange on Hortsman of London, payable to Fiske and Bridge. The drawers, or one of them, placed the bill in the hands of a broker with the names of the payees indorsed upon it, for negotiation; and it was sold to the defendants bona fide and for full value. They transmitted it to London, where it was presented, accepted, and paid at maturity. It turned out that the indorsement of the payee's name was forged; whereupon the present action was brought to recover the money paid. The court held that the plaintiff was not entitled to recover.[2]

stances, (*a*) is an admission that the first or any other indorser's name is genuine. Chitty, Bills, 628, 7th Am. ed. In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money on the mistaken belief thus induced that the name was genuine.'

[1] Hortsman *v.* Henshaw, 11 How. 177; Ford *v.* Meacham, 3 Hill (S. C.) 227; Burgess *v.* Northern Bank of Ky., 4 Bush, 600; Coggill *v.* American Exchange Bank, 1 Comst. 118. See Bigelow's Bills and Notes, 567.

[2] Taney, C. J. who delivered the opinion, said: 'The general rule undoubtedly is that the drawee by accepting the bill admits the handwriting of the drawer but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill; and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer. But in this case the bill was put in circulation by the drawers with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order. Now the acceptor of a bill is presumed to accept upon

(*a*) This must be taken with some caution. See Hortsman *v.* Henshaw, infra.

A similar question arose in 1847 in Coggill *v.* American Bank.[1] In that case one of the drawers of the bill forged the payee's name, and then procured it to be discounted; and at maturity the plaintiff (the drawee) paid it. On discovering the forgery he sued the defendant, a bona fide holder, to whom he had paid the bill, to recover the sum paid. The court held that the action could not be maintained, basing the decision on the fact that the payee had no interest in the bill, and comparing it to a bill drawn to a fictitious person, such a bill being in effect payable to bearer.[2] The cases further show that the drawee may deny the genuineness of the indorsement if the forgery occurred after the bill passed out of the drawer's hands;[3] and this is the line of distinction drawn in Hortsman *v.* Henshaw.

The case of Beeman *v.* Duck[4] presents another phase of the doctrine of estoppel upon the acceptor of a bill. This was an action of assumpsit upon a bill of exchange purporting to be drawn on the defendant by Bradshaw and Williams, an existing firm, payable to their order; the paper being accepted by the defendant, and indorsed by Bradshaw and Williams to the plaintiff. The drawing and indorsement (in the same handwriting) were forgeries. There was a plea traversing the drawing of the bill; but this fact was not brought to the notice of

funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him by the holder. The rights of the parties are therefore to be determined as if this bill was paid by Hortsman out of the money of Fiske and Bradford in his hands. And as Fiske and Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received. We take the rule to be this: Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds upon the credit of the drawer, he must look to him for indemnity, and cannot upon that ground defend himself against a bona fide indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties.'

[1] 1 Comst. 113.

[2] Cooper *v.* Meyer, 10 Barn. & C. 468; s. c. 5 Man. & R. 387; Vere *v.* Lewis, 3 T. R. 182; Minet *v.* Gibson, ib. 481; s. c. 1 H. Black. 569; Collis *v.* Emmett, 1 H. Black. 313; Phillips *v.* Thurn, L. R. 1 C. P. 463; Plets *v.* Johnson, 3 Hill, 112; Bigelow's Bills and Notes, 567. See particularly, in regard to fictitious or non-existing payees, Vagliano *v.* Bank of England, 23 Q. B. D. 243, C. A. af'g 22 Q. B. D. 103.

[3] Burchfield *v.* Moore, 3 El. & B. 683; Talbot *v.* Bank of Rochester, 1 Hill, 295.

[4] 11 Mees. & W. 251. See Greenfield Bank *v.* Crafts, 4 Allen, 447.

the court below until the jury had given their verdict upon what had been regarded the principal point in dispute. The question now arose upon the validity of the plea referred to, in an application by the plaintiff for a new trial. The court held that if the bill was accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped to deny the genuineness of the indorsement as well as that of the drawing. But the judges inclined to the opinion that if he was ignorant of the forgery, he would not be precluded from denying the genuineness of the indorsement, though it was in the same hand as that of the drawer's signature.[1]

The fact should be observed that the estoppel of the drawee by acceptance or payment extends only to the signature.[2] The acceptor may show an alteration in the body of the instrument, whether the act was before or after the acceptance,[3] unless it was done by the drawer before acceptance.[4] The point was

[1] 'On the argument before us,' said Mr. Baron Parke, 'it was contended by the plaintiff's counsel that, the drawing being a forgery, the defendant by his acceptance had undertaken to pay to any one who held the bill by an indorsement in the same handwriting, according to the principle laid down in Cooper *v.* Meyer, 10 Barn. & C. 468; s. c. 5 Man. & R. 387; and it was said there was evidence in the case that the signatures in drawing and indorsing were those of the same person. If this were so, the rule ought to be made absolute for a new trial, as the question as to the identity of the signature has not been submitted to the jury. But on the part of the defendant it is insisted that the case of Cooper *v.* Meyer is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that in such case the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties, — a doctrine which is clearly established as to bills wherein the signature is not forged. Robinson *v.* Yarrow, 7 Taunt. 455. In analogy to that case the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw and Williams by themselves, or some agent authorized to draw in their name; but it does not admit that it was indorsed by themselves, or some agent authorized to indorse, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of Cooper *v.* Meyer.' The learned baron added that there was some doubt whether the bill should not have been declared upon as payable to bearer, according to Gibson *v.* Minet, 1 H. Black. 481, and Bennett *v.* Farnell, 1 Camp. 130, 180 c, which cases had not been cited or this question raised in Cooper *v.* Meyer.

[2] Ante, p. 481.

[3] Clews *v.* Bank of New York, 89 N. Y. 418.

[4] The language of Ward *v.* Allen, 2

decided in Bank of Commerce *v.* Union Bank.[1] This was assumpsit to recover $1,005 paid by the plaintiffs upon a bill of exchange drawn upon them, payable to the order of J. Bonnet, and by him indorsed; after which it passed into the hands of the defendants' principal, bona fide and for value. It appeared that the draft was originally drawn payable to the order of J. *Durand* for one *hundred* and five dollars, and that afterwards the name 'Durand' was altered to 'Bonnet,' and the word 'hundred' to 'thousand;' and in this altered condition it had been paid by the plaintiffs to the defendants. It was argued for the defendants that there was no rule that the banker must know the handwriting of his customer in the signature, but that the rule was that the banker should take care not to pay away his customer's money without sufficient authority for the purpose, and that it was the banker's duty to see that the bill was genuine in all respects. The attempt to establish the principle that a different degree of scrutiny was required in examining the body of the draft by the person on whom it was drawn from that required in examining the signature of the drawer was fallacious, and ought to be discountenanced. But the court held the plaintiffs entitled to recover on the ground that it could not be presumed that the acceptor was familiar with the handwriting of the body of the bill.[2]

Met. 53, especially the headnote, might imply that acceptance admits the body of the paper entire, as it then stood; but the alteration in question in that case had been made by the *drawer*, as in Hortsman *v.* Henshaw, supra, p. 484. The same may be said of Langton *v.* Lazarus, 5 Mees. & W. 629.

[1] 3 Comst. 230.

[2] 'There is no ground,' said Ruggles, J. speaking for the court, 'for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would in most cases be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would be answerable for negligence in paying an altered bill if the alteration were

Acceptance also conclusively admits the procuration to draw in the case of a bill drawn by procuration; but it does not admit a procuration to indorse though the indorsement be by the same agent.[1] In Robinson *v.* Yarrow, cited in the note, Staeben & Co. authorized one Henry to draw on the defendant, which he did 'per proc.,' making the bill payable to the order of the drawers, by whom it was indorsed to the plaintiff 'per proc.' The defendant accepted the bill, and now resisted the payment. The question was whether the plaintiff was bound to prove the procuration to indorse; and it was held he was. 'The mere acceptance,' said Mr. Justice Park, 'proves the drawing, but it never proves the indorsement. It is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration; the first is a power to get funds into the agent's hands, the other to pay them out.'

The effect of an acceptance for honor appears to be not materially different in effect from acceptance by the drawee. In Wilkinson *v.* Johnson[2] the plaintiffs had accepted certain bills for the honor of certain *indorsers* (H. & Co.), and paid over the money to the defendants, who had been the holders of the bills. The fact was discovered on the same day that the bills were forgeries, the names of the indorsers H. & Co., among others, not being genuine. Due notice of the fact was given; whereupon the defendants having refused to repay the money, the present action of assumpsit was brought to recover the amount. And the action was sustained.[3]

manifest on its face.' An acceptor is not estopped to show that the bill is a foreign one, contrary to its date. Steadman *v.* Duhamel, 1 Com. B. 888.

[1] Robinson *v.* Yarrow, 7 Taunt. 455; Beeman *v.* Duck, 11 Mees. & W. 251; Garland *v.* Jacomb, L. R. 8 Ex. 216, Ex. Ch.

[2] 3 Barn. & C. 428.

[3] Abbott, C. J. in delivering judgment, said: 'The plaintiffs were not drawers or acceptors of the bills, nor the agents of any supposed acceptors. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonor to the prior parties; which was accordingly given. The plaintiffs were called upon to pay for the honor of Heywood & Co., whose names appeared on the bills among other indorsers. The very act of calling upon them in this character was calculated in some degree to lessen their attention. A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according

Some of the reasoning of the Chief Justice in this case may possibly be broad enough to cover the case of an acceptance for the honor of the drawer. But the later cases do not sanction such a view, and it is settled law that acceptance for honor like ordinary acceptance amounts to a conclusive admission of the hand of the drawer when the acceptance was made for the drawer's honor;[1] subject, no doubt, to the like limitations as prevail in the case of acceptance by the drawee in the usual manner. Phillips *v.* Thurn was an action by the holder of a bill accepted by the defendant supra protest for the honor of the drawer, acceptance having been refused by the drawee. The question raised in the first stage of the case[2] (for there were two stages of it) was upon the validity of a plea setting up the defence that the payee was a fictitious person, and that the defendant was ignorant of that fact at the time he accepted the bill. The plea was held bad. The point thus raised was not whether the acceptor supra protest was bound to know the handwriting of the drawer, but whether the acceptance had put the defendant in the position of the drawer; and it was

to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports on the part of the person making it that the name of a correspondent for whose honor the payment is asked is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though where all the negligence is on one side it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not in our opinion to profit by the mistake into which he may by his own prior mistake have led the other; at least if the mistake is discovered before any alteration in the situation of any of the other parties; that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches. . . . We think the payment in this case was a payment by mistake and without consideration to a person not wholly free from blame, and who ought not, therefore, in our opinion to retain the money.'

[1] Phillips *v.* Thurn, 18 C. B. N. S. 694; S. C. L. R. 1 C. P. 463; Goddard *v.* Merchants' Bank, 4 Comst. 147; Story, Bills of Exchange, §§ 261, 262.

[2] 18 C. B. N. S. 694.

held that it had. And as the drawer would be estopped to say that the payee was a fictitious person, the defendant was also held estopped. 'It seems to me,' said Chief Justice Erle, 'that there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think he is equally to admit that the bill is a valid bill.'

When Phillips *v.* Thurn came before the court the second time[1] it appeared that the drawee, having refused to accept, gave the person presenting the paper a letter to the plaintiffs, intimating that the defendant would probably accept the bill for the drawer's honor. The plaintiffs took the letter and bill to the defendant, and he assuming it to be genuine accepted it for the drawer's honor; and the plaintiffs thereupon discounted it. It turned out that the drawer's signature was a forgery; but the court now held that the defendant was estopped from asserting the fact, the plaintiffs having been induced to part with their money on the faith of the defendant's acceptance.

The English cases all show that where there are prior parties to the paper, entitled to remedies against antecedent parties, if the forgery is discovered too late to enable them to fix the liability of such parties, the acceptor will not be permitted to recover the sum paid to a bona fide holder.[2] In Mather *v.* Maidstone, just cited, the acceptor instead of paying had given a fresh acceptance after the maturity of a previous bill drawn on him and purporting to have been accepted by him. A month later he discovered that the previous acceptance was a forgery; but the court held him estopped to allege the fact on the ground

[1] L. R. 1 C. P. 463.

[2] Cocks *v.* Masterman, 9 Barn. & C. 902; Mather *v.* Maidstone, 18 C. B. 273; Wilkinson *v.* Johnson, 3 Barn. & C. 428; Smith *v.* Mercer, 6 Taunt. 76. But it is said that the strict rule held in England respecting the time within which notice must be given does not prevail in America. Canal Bank *v.* Bank of Albany, 1 Hill, 287, 292. See 2 Parsons, Notes and Bills, 598, 599. This seems doubtful. See Irving Bank *v.* Wetherald, 36 N. Y. 335; Merchants' Bank *v.* National Bank, 101 Mass. 281; National Bank *v.* Bangs, 106 Mass. 441. Goddard *v.* Merchants' Bank, 4 Comst. 147, certainly is not an authority for the proposition, for there was no prior party to be charged in that case. And the same may be said of Ellis *v.* Ohio Ins. Co., 4 Ohio St. 628, 660.

that the plaintiff, a bona fide indorser, had lost his remedy against the prior indorsers.

Still, a person is not bound as an acceptor of a bill bearing a forged acceptance by the mere fact that he has previously paid a bill similarly forged, if in fact he has not led the holder to believe that the acceptance of the bill sued upon was genuine.[1] But if it is made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of the principal, then there will be 'almost conclusive evidence' against the latter that the acceptance has been written by his authority.[2]

An exception has been made to the rule that prevents a recovery of money paid by the acceptor of a forged draft, where the defendant becomes holder of the draft *before acceptance* by the plaintiff, and where the loss had already attached; the acceptor giving notice of the forgery immediately upon the discovery of it.[3] If this is correct (and it probably is) Price *v.*

[1] Morris *v.* Bethell, L. R. 5 C. P. 47; Cohen *v.* Teller, 93 Penn. St. 123.

[2] Ibid., Bovill, C. J.; Barbell *v.* Gingell, 3 Esp. 60; Crout *v.* De Wolf, 1 R. I. 393.

[3] McKleroy *v.* Southern Bank, 14 La. An. 458. See National Bank of North America *v.* Bangs, 106 Mass. 441. 'The defendant became the holder of the draft,' said the court in the case first cited, 'before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiffs' acceptance, or on their guaranty of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or were then guilty of the omission of any duty toward the defendant as the purchaser of the bill? If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record.' The court cited Chitty, Bills, 464, where the learned author says: 'If he [the holder] thought fit to rely on the bare representation of the party from whom he took it [the bill] there is no reason why he should profit by the accidental payment when the loss had already attached upon himself, and why he should be allowed to retain the money when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that of late upon questions of this nature these latter con-

Neal, heretofore stated, is partly overruled. One of the bills in that case had been paid without acceptance; but no notice of this fact was taken.

The Ohio court has gone still further, and held that even in the case of payment to an innocent indorsee the acceptor may recover the money if it appear that by the settled course of business between the parties or by a general custom of the place the holder took upon himself the duty of exercising some material precaution to prevent the loss, and failed to perform that duty.[1] And it is held in Massachusetts that if the holder indorse the paper (for collection) before it is presented to the drawee for payment, the latter can recover the money paid by him, on the ground that the holder's indorsement tended to put the drawee off his guard; such an act being an assertion of the genuineness of the bill.[2] So too if the owner of the paper on presenting it to the drawee withhold from him information important to the drawee upon the question of genuineness, the estoppel will be removed.[3]

Acknowledging a signature as one's own works of itself, it should seem, an estoppel in favor of a person to whom the acknowledgment is made, or for whom it was intended, if he is induced thereby to purchase the paper.[4] Indeed, it has been held that where a person receives from another paper purporting to be his (the receiver's) own paper, as genuine, and passes the amount to the credit of such person, the party receiving cannot, after any considerable lapse of time, recover the amonnt so credited by alleging that the paper was forged.[5] In the case

siderations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found on examining the older cases that these mere facts afford a distinction, and that upon attempting to reconcile them they are not as contradictory as might on first view have been supposed.'

[1] Ellis *v.* Ohio Ins. Co., 4 Ohio St. 628.

[2] National Bank of North America *v.* Bangs, 106 Mass. 441.

[3] First National Bank *v.* Ricker, 71 Ill. 439.

[4] Goodell *v.* Bates, 14 R. I. 65; Leach *v.* Buchanan, 4 Esp. 226; Cohen *v.* Teller, 93 Penn. St. 123; Rudd *v.* Matthews, 79 Ky. 479. See, however, Koons *v.* Davis, 84 Ind. 387, 389, which may be doubted. A party must be bound to know whether a signature is his own, at least if he has an opportunity to see the writing. And in a case of this kind there may well be a warranty of genuineness, so as to cut off any right of the vendor to say that the purchaser knew the facts.

[5] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333. See Oddie *v.*

cited the Bank of Georgia having originally issued the paper in question, it was in the course of circulation fraudulently altered, and subsequently found its way into the Bank of the United States. The latter then presented it to the former, which received it as genuine and placed it to the general account of the Bank of the United States as cash by way of deposit. The forgery was discovered nineteen days afterwards, upon which notice was given and a tender of the paper made to the Bank of the United States, and refused. Both parties were equally innocent, and it was not disputed that the Bank of the United States was a bona fide holder for value. The Bank of Georgia now sued to recover the amount of the deposit. But the court held that the action could not be maintained.[1]

According to the better authorities, one who passes to another

National Bank, 45 N. Y. 735, 742; Tyler *v.* Bailey, 71 Ill. 34, holding this rule not to apply to government officers receiving land warrants.

[1] 'The modern authorities,' observed Mr. Justice Story in delivering judgment, 'certainly do in a strong manner assert that a payment received in forged paper or in any base coin is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. . . . But without entering upon any examination of this doctrine it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin. . . . But if the present case is to be considered, as the defendant's counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view the notes must be deemed to have been accepted by the defendants as genuine notes, and payment to have been promised accordingly. Credit was given for them as cash by the defendants for nineteen days, and during all this period no right could exist in the plaintiffs to recover the amount against any other person from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs in Smith *v.* Mercer, 6 Taunt. 76, the prior holders would be discharged; and the case of the Gloucester Bank *v.* The Salem Bank, 17 Mass. 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants. But waiving this narrower ground, we think the case may be justly placed upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there the acceptor is presumed to know the drawer's signature. Here a fortiori the maker must be presumed and is bound to know his own notes.'

for value and without notice a negotiable bill, note, or check, without indorsing the same, is still deemed in law to have asserted to the purchaser the genuineness of the whole paper as it stands.[1] This, however, is not (though at first it may resemble) a case of estoppel, for the vendor of the paper does not seek to deny the truth of any affirmation. He denies making any affirmation at all.

It has sometimes been supposed that negligence on the part of the drawer of a bill or check, or of the maker of a note, in leaving a blank which has been so filled as to escape detection, may have the effect to estop such party to allege that the paper has been altered.[2] This notion started from a misconception of Young *v.* Grote.[3] That was a case of the proper adjustment of a loss, between the drawer and the acceptor, and merely decided that the result of the act of the drawer in carelessly leaving a blank after the words expressing the sum payable should be laid at his own door, and not charged to the acceptor who had innocently paid the forged bill. It has been repeatedly shown that the case was not based upon estoppel,[4] even if it can be sustained at all (for it is not the natural result of leaving a blank that a forgery should be committed);[5] and the better authorities agree that no estoppel can exist upon any such facts to prevent the party, drawer of a bill or maker of a note, from setting up the alteration.[6] This assumes, of course, that the paper had been

[1] Bigelow's Bills and Notes, 168.

[2] Rainbolt *v.* Eddy, 34 Iowa, 440; McCramer *v.* Thompson, 21 Iowa, 249; McDonald *v.* Muscatine Bank, 27 Iowa, 319; Capital Bank *v.* Armstrong, 62 Mo. 59; Iron Mountain Bank *v.* Murdock, ib. 70; Redington *v.* Woods, 45 Cal. 406; Worrall *v.* Gheen, 39 Penn. St. 388; Garrard *v.* Haddan, 67 Penn. St. 82; Phelan *v.* Moss, ib. 59; Bigelow's Bills and Notes, 574.

[3] 4 Bing. 253.

[4] Swan *v.* North British Co., 2 Hurl. & C. 175, 189, 190; Halifax Union *v.* Wheelwright, L. R. 10 Ex. 183, 192; Greenfield Bank *v.* Stowell, 123 Mass. 196, 200, 201. See also Seton *v.* Lafone, 19 Q. B. D. 68, C. A. affirming 18 Q. B. D. 139; Merchants of the Staple *v.* Bank of England, 21 Q. B. D. 160, C. A.; Arnold *v.* Cheque Bank, 1 C. P. D. 578. These cases are considered in chapter 19.

[5] See Merchants of the Staple *v.* Bank of England, 21 Q. B. D. 160, 176, Bowen, L. J.; Vagliano *v.* Bank of England, 22 Q. B. D. 10; affirmed on appeal, 23 Q. B. D. 243. These cases show that negligence, to work an estoppel in such cases, must be immediately connected with the transaction which followed. See, further, chapter 19.

[6] English cases, supra, note 4, and authorities there cited; Holmes *v.* Trumper, 22 Mich. 427; Greenfield Bank *v.* Stowell, supra, and the cases therein reviewed.

delivered as a completed instrument; it has nothing to do with the similar appearing case of violations of confidence by the wrongful filling of blanks in paper not completed.[1] That is a case of agency.

§ 2. *Capacity.*

The execution of a negotiable note estops the maker to deny the *existing* capacity of the payee to indorse the paper.[2] The case cited was an action of assumpsit by the indorsee of a promissory note against the maker, to which the defendant pleaded that the payee had, before the note was made, become a bankrupt and that his property had passed to assignees, whereby the right to indorse the note had become vested in them, so that his indorsement of the paper was void. But this was held an inadmissible defence, though the jury found that the indorsement had been made without the consent of the assignees.[3]

In like manner, the acceptor of a bill is estopped to say that the drawer and payee was a married woman, or otherwise incom-

[1] See Bigelow's Bills and Notes, 571 et seq.

[2] Drayton *v.* Dale, 2 Barn. & C. 293; Vagliano *v.* Bank of England, 23 Q. B. D. 243, 257; and cases infra. Where shares of stock are transferable by the vendor's signature to a blank transfer, he is estopped to deny the authority of the buyer to insert his name therein as the transferee. Colonial Bank *v.* Hepworth, 36 Ch. D. 36, Chitty, J. This was a case of a contest between two innocent purchasers for value of the same stock, in which the party prevailed whose name was finally inserted in the blank transfer.

[3] Abbott, C. J. took the ground that as it did not appear that the assignees had interfered or made any claim, the payee had a right to indorse. But the better ground, it would seem, was stated by Bayley, J. 'This is an action,' said he, 'upon a note payable to Clarke, or to the order of Clarke. The defendant therefore by making such note intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defence now set up is that although he has issued a security to the world importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now, this is a fraud upon the public. It is a general principle applicable to all negotiable securities that a person shall not dispute the power of another to indorse such an instrument when he asserts by the instrument which he issues to the world that the other has such power.' The same ground substantially was taken by Holroyd, J. The learned judge cites the case of Taylor *v.* Croker, 4 Esp. 187, showing that the same principle applies to acceptance. In this case a bill was drawn by infants. The defendants accepted the bill, and the infants indorsed it. Lord Ellenborough held that as the defendants had by their acceptance admitted the competency of the infants to indorse, they should not now be permitted to say that they were incompetent. See Jones *v.* Darch, 4 Price, 300.

petent.[1] In a case already cited[2] it was held by Lord Abinger that the estoppel arose even though the drawer was a bankrupt before the bill was executed; and the doctrine has been confirmed in the Queen's Bench, so that no doubt can now exist

[1] Smith *v.* Marsack, 6 C. B. 486. 'In support of a contrary doctrine,' said Wilde, C. J. in delivering judgment in Smith *v.* Marsack, supra, 'the cases of Connor *v.* Martin, 1 Strange, 516, Barlow *v.* Bishop, 1 East, 432, and Prince *v.* Brunatte, 1 Bing. N. C. 435, s. c. 1 Scott, 342, were cited on the argument by the counsel for the defendant. In Connor *v.* Martin, as reported in Strange, the plaintiff declared on a note made to a feme covert, and indorsed by her to him; and on argument judgment was given for the defendant, the right being in point of law in the husband, and the wife having no power to dispose of it. But this case was cited by Dennison, J. Rawlinson *v.* Stone, 3 Wils. 1, 5, from a note taken by himself in court; and it appears from that learned judge's statement that the promissory note in question had been given to the wife *before marriage*. Barlow *v.* Bishop is certainly a direct authority for the position that if a note is drawn payable to a woman or order, and her indorsee sues the maker, he may set up as a defence that she was a married woman, though he knew her to be such at the time he made the note. But it was observed by Lord Abinger in Pitt *v.* Chappelow, 8 Mees. & W. 616, that in Barlow *v.* Bishop the plaintiff must be taken to have known the fact of the husband's property in the bill, and therefore could not take an assignment of it from the wife. Indeed, it appears from the report of the case at nisi prius in Espinasse, 3 Esp. 266, that the wife had given a previous note for the money in her own name, and that the note in question was given in consequence of such former note not being negotiable, which appears to favor Lord Abinger's supposition that the plaintiff must have known of her coverture before the note was indorsed to him. In Prince *v.* Brunatte, it was certainly assumed by the court as well as by the counsel on both sides that such a plea as the present would be a good answer to the action; and the same observation arises with respect to the case of Cotes *v.* Davies, 1 Camp. 485, and that of Prestwick *v.* Marshall, 7 Bing. 565; s. c. 5 Moore & P. 513. But in none of these cases does it appear that the point now under consideration was ever made, viz. that the case falls within the general principle — which is stated by Bayley, J. in his judgment in Drayton *v.* Dale [ante, p. 495], as applicable to all negotiable securities — that a person shall not dispute the power of another to indorse an instrument when he asserts by the instrument that the other has such power. And we can discover no reason why this principle should not be applicable; and if it is, it appears to us to govern the present case, and to prove that the plea in question is bad. It need scarcely be added that in so deciding we do not mean at all to impugn the proposition that if a bill or note is made payable to the order of a married woman the property in it will pass by the indorsement of the husband, or he may sue on it, either joining his wife as a party to the action, or in his own name at his option. And consequently it cannot be denied that the defendant may possibly be compelled to pay the bill in question twice. But this is a consequence which follows from his own act of accrediting the capacity of a woman to indorse, by accepting a bill payable to her order, who in truth was incapable.'

[2] Pitt *v.* Chappelow, 8 Mees. & W. 616.

upon the point.[1] In this case, assumpsit by a bona fide indorsee against the acceptor of a bill, the defendant pleaded that the drawer was an uncertificated bankrupt before the acceptance was given. But the court on demurrer held him estopped.[2]

The same ruling was again made by Mr. Baron Parke, in Hallifax *v.* Lyle.[3] This was an action on a bill of exchange against the acceptors, who pleaded that the drawers (who were also payees and indorsers) were a body corporate having no authority to draw, indorse, issue, or negotiate bills of exchange. But the plea was held bad on demurrer.[4]

This estoppel in respect of capacity, however, appears to be affirmative only, not prospective and promissory. Hence, should the payee have become wholly incompetent at the time of his indorsement, supposing the act to be substantially after[5] the execution of the paper by the maker or the signature of the acceptor, the maker or acceptor would be permitted to set up the fact in bar of the indorsee's right of action. Still, if this subsequent incapacity of the payee is not complete, but partial only, so that his or her indorsement is but voidable and not void, then, it seems, the indorsement will pass a title that will be good until properly repudiated. Thus, though it has sometimes been declared that the contract of a lunatic is absolutely void,[6] unless entered into during a lucid interval, the better opinion appears to be that it is voidable only;[7] and in this view

[1] Braithwaite *v.* Gardiner, 8 Q. B. 473.

[2] Lord Denman, C. J. observed: 'Lord Abinger was a high authority on subjects of this kind. It is clear what his opinion was on the point of estoppel in Pitt *v.* Chappelow, 8 Mees. & W. 616; and I think it rests on sound principles. In this case all parties knowing the bankrupt's situation the defendant accepts a bill drawn by him. He thereby admits that the bankrupt had power to draw upon him; and therefore on a short and simple ground, which is always the best, I am of opinion that the plaintiff has a right to maintain the action.' Kitchen *v.* Bartsch, 7 East, 53, was distinguished on the ground that there the drawer, who was the bankrupt, himself brought the action. Wightman, J. said that the answer which availed against him as a plaintiff could not serve an acceptor who of his own authority had made the bill of the bankrupt negotiable, and was sued upon it by a bona fide holder.

[3] 3 Ex. 446.

[4] Sanderson *v.* Collman, 4 Man. & G. 209, was distinguished.

[5] Quære in regard to an indorsement made by the payee of a bill *before* acceptance; the warranty is of *present* capacity.

[6] Rogers *v.* Blackwell, 49 Mich. 192.

[7] Carrier *v.* Sears, 4 Allen, 336; Allis *v.* Billings, 6 Met. 415; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Burke *v.* Allen, 29 N. H. 106; Ash-

his indorsement will pass a title to a bona fide purchaser for value until the act has been duly repudiated by his guardian or other representative. Hence, until repudiation so made, it would be of no avail to the acceptor of a bill to say that the payee, though sane when the bill was accepted, was insane when he indorsed it.[1]

Indorsement appears to work a sort of warranty of capacity, in regard to *prior* parties; that is, the case is not affected by the fact that the indorsee may know that one of the prior parties is in fact incompetent.[2] The case cited was an action by the indorsee of a note against an indorser. The note had been executed by two married women, of which fact the plaintiff had been aware when he took the paper. The incapacity of the makers to contract was now alleged in defence by the indorser; but judgment was given for the plaintiff. So too the guarantor of a bond perhaps warrants, but certainly is estopped to deny, the competency of the makers of it.[3] Whether accepting a bill or making a note warrants, or only admits by way of estoppel in pais, the capacity of the payee to indorse does not appear to have been actually adjudicated.[4] The case of indorsement clearly does not decide the question; indorsement is equivalent, generally speaking, to drawing a bill, and hence of necessity cuts off any question concerning prior parties. And there is ground for doubting whether acceptance can be treated as a warranty and not merely an estoppel in regard to the payee's capacity.[5] It may be added that sureties upon official bonds executed by de facto officers are estopped to deny (do they warrant?) the proper execution of the bonds.[6]

craft *v.* De Armond, 44 Iowa, 229; Riggan *v.* Green, 80 N. Car. 236; 2 Kent, 451.

[1] Carrier *v.* Sears, 4 Allen, 336, explaining Peaslee *v.* Robbins, 3 Met. 164, apparently contra. And see Burke *v.* Allen, 29 N. H. 106, a doubtful case in regard to infancy.

[2] Erwin *v.* Down, 15 N. Y. 575. But see Barlow *v.* Bishop, supra, p. 496.

[3] Remsen *v.* Graves, 41 N. Y. 471.

[4] So far as the peculiar English law of fictitious payees is concerned, the matter is shown by Lord Justice Bowen, in a very instructive opinion, to rest on grounds of estoppel. Vagliano *v.* Bank of England, 23 Q. B. D. 243, 257, et seq.

[5] See Vagliano *v.* Bank of England, supra. The language of warranty has been loosely used as to such cases.

[6] State *v.* Cooper, 53 Miss. 615; Jones *v.* Scanland, 6 Humph. 195; People *v.* White, 24 Wend. 520; Stephens *v.* Crawford, 1 Kelly, 574; s. c.

§ 3. *Certification of Checks.*

The certification of checks and the like acts bear some resemblance to those above considered.[1] Indeed, so far as the question of the right of the certifying party to set up an alteration is concerned, the law is no doubt the same as prevails in regard to the acceptance of a bill. Certification conclusively admits the genuineness of the drawer's signature, with the same limitations, it seems, that apply to acceptance; it does not admit the genuineness of other signatures or of the body of the check.[2] The law in regard to admitting the capacity of the drawer to draw and of the payee to indorse is also, it seems, the same in both cases.

But there is another case of a different nature. An estoppel arises where the teller or cashier of a bank certifies verbally or in writing[3] that a check or draft drawn upon the bank or a note payable at the bank is 'good,' and the party presenting the paper, relying upon the certification, has been led to change his position or course of action; but not if there has been no change of position. In Irving Bank *v.* Wetherald mistake in the state of funds of the party whose note was certified as good was discovered on the very day when the certificate was given, and immediate notice was given to the presenting bank and proper steps taken to charge the defendants, who were indorsers. The action was by the certifying bank, which had become the holder, against the indorsers; and it was held that the defendants were liable.[4]

3 Kelly, 499; Iredell *v.* Barber, 9 Ired. 250; Green *v.* Wardwell, 17 Ill. 278.

[1] A certificate of stock in a corporation, under seal, and signed by the proper officers, estops the corporation towards innocent purchasers for value to say that the stock was irregularly issued, so far at least as to make the corporation responsible for the value of the stock where for any reason the possessor cannot be recognized as a stockholder. Commonwealth *v.* Reading Bank, 137 Mass. 431, 440, distinguishing Moores *v.* Citizens' Bank, 111 U. S. 156.

[2] Clews *v.* Bank of New York, 89 N. Y. 418, 422; Espy *v.* Bank of Cincinnati, 18 Wall. 604.

[3] Irving Bank *v.* Wetherald, 36 N. Y. 335.

[4] In delivering judgment in this case Hunt, J. said: 'Both the judge at the circuit and the general term were of the opinion that the notice by the plaintiffs to the Seventh Ward Bank [which had presented the paper] of the mistake in certifying Wilson's check to be good, before any steps had been taken or any measures omitted by the Seventh Ward Bank, and while there was still time to fix all the parties upon the note, relieved the plaintiffs from their liability on the certificate. In this opinion I concur. Such a certificate possesses no extraordinary or hidden power. It

In Massachusetts it is held that the certification of checks is not within the inherent power of the office of teller, so as to bind the bank to pay the amount of it to any person, though a bona fide holder.[1] But in New York it is held that a bona fide holder for value of a negotiable check certified to be good by the paying teller of the bank on which it is drawn, though his authority to certify is limited to cases where the bank has funds of the drawer to meet the check, can recover of the bank the amount of the check notwithstanding the fact that the drawer had no funds in the bank and the certification by the teller was in violation of his duty.[2] And this decision has been followed by the Supreme Court of the United States in a recent case.[3]

would impose no greater liability than its terms fairly require. . . . The correctness of this certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers, as upon non-payment on presentation, the certifying bank is estopped from denying the truth of its statement. Having asserted of its own knowledge that the maker has funds in its bank to meet the note, and the presenting bank having omitted to charge its indorsers in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement, and his statement binds the bank, whether accurate or erroneous. Meads *v.* Merchants' Bank of Albany, 25 N. Y. 143; Farmers' & M. Bank *v.* Butchers' & D. Bank, 16 N. Y. 125. In the present case the Irving Bank discovered its error in stating that it had funds for the payment of Wilson's note in sufficient time to prevent any loss in consequence of the error. It immediately notified the Seventh Ward Bank of the error, and in time to enable it to make a presentment if necessary and to charge the indorsers. No damage, therefore, could accrue to the latter bank from the erroneous information. They were bound to accept and to act upon the corrected information, if there were time and opportunity so to do. I agree with the courts below that the plaintiffs might have stopped at that point, and there would have been no liability on their part to the Seventh Ward Bank.'

[1] Mussey *v.* Eagle Bank, 9 Met. 306.

[2] Farmers' Bank *v.* Butchers' Bank, 16 N. Y. 125; Continental Bank *v.* National Bank, 50 N. Y. 575.

[3] Merchants' Bank *v.* State Bank, 10 Wall. 604. In the New York case above referred to Mr. Justice Selden, who delivered the opinion, having remarked that in the case of funds a certification by the teller would be proper, said: 'But it is insisted that his power extended only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound. It may be doubted whether such a prohibition adds anything to the restrictions which would otherwise exist upon the powers of the agent. A teller acting under a general power to certify checks would be guilty of an excess of authority, and a clear violation of duty, if he certified without funds. The powers of the cashier himself or other principal financial officer of the bank would no doubt be subject to the same limitation. To certify a check when the bank has no

In the case referred to as decided by the Supreme Court of the United States[1] the checks had been certified as good by

funds to meet it is to make a false representation; and neither the incidental power of the cashier nor a general power conferred upon any other officer could be construed to authorize that. Hence if a bank is holden in any case upon a certificate of its cashier that a check is good when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation notwithstanding it is false and unauthorized. It would seem therefore that the defence insisted upon here would have been equally available if the checks in question had been certified by the cashier himself. It might then have been urged with truth that the cashier had violated his duty and exceeded the proper limit of his powers in making the certificate; and if the argument be sound that the principal is in no case bound unless the act of the agent is within the powers either actually or apparently conferred upon him, the bank would not be holden in such a case. . . . It will be seen that if these views are correct, the present case does not turn in any degree upon the rules applicable to special agencies, but that the question would have been precisely the same if the check had been certified by the cashier or other principal financial officer of the bank. As they may, however, admit of doubt, I shall treat the case as one of an agency specially restricted, and shall simply inquire whether a bona fide holder for value of a negotiable check certified by a special agent whose authority is limited to cases where the bank has funds of the drawer in hand can enforce payment of the check, provided the bank has no such funds. . . . The defence assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority either real or apparent to make such representations, but for reasons entirely different. In Hern *v.* Nichols, 1 Salk. 289, the leading case on the subject, where an agent authorized to sell a quantity of silk had made certain fraudulent representations by which the purchaser was deceived, the principal was held liable. Lord Holt there said: "Seeing somebody must be loser by this deceit it is more reasonable that he that employs and puts *a confidence* in the deceiver should be a loser, than a stranger." The principle of this case has never, I think, been overruled, but on the contrary has been repeatedly approved and confirmed. It will be found directly applicable to the present case. The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss? The reasoning of Lord Holt in the case of Hern *v.* Nichols applies here with peculiar force. The bank selects its teller and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank lead others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment so far as is known and can be seen by the party dealing with him, he is guilty of misrepresentation, ought not

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604.

the cashier of the bank. Mr. Justice Swayne, in delivering the judgment, observed that estoppel in pais presupposes an error

the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitively ascertained except by application to him. These circumstances would seem to bring the case decidedly within the principles adopted in Hern *v.* Nichols, and in the subsequent decisions based upon that case. This conclusion is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers. If, therefore, a person knowing that the bank has no funds of the drawer should take a certified check upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact whether the bank has funds or not the case is different. That is a fact which a stranger who takes a check certified by the teller cannot be supposed to have any means of knowing. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case. It is, I think, a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note by one of the partners for his own individual benefit affords an apt illustration of this rule. Each of the partners is the agent of the partnership as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own business or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a bona fide holder, the firm is precluded from questioning the authority of the partner and is effectually bound. The cases in this state by which this doctrine is illustrated and established are numerous and uni-

or a fault implying an act in itself invalid. The rule proceeded upon the consideration that the author of the misfortune should not himself escape the consequences and cast the burden upon

form. Livington *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Laverty *v.* Burr, 1 Wend. 529; Williams *v* Walbridge, 3 Wend. 415; Boyd *v.* Plumb, 7 Wend. 309; Gansvoort *v.* Williams, 14 Wend. 133; Joyce *v.* Williams, ib. 141; Wilson *v.* Williams, ib. 146; Catskill Bank *v.* Stall, 15 Wend. 364; s. c. 18 Wend. 466. It will be found difficult to distinguish these cases in principle from that now before the court. Every person taking the negotiable note or acceptance of a partnership executed by one of the partners in the name of the firm is bound to know the extent of the partner's authority to bind the firm; but this obligation does not extend to the consideration for which the note or acceptance was given. If given for the private debt of one of the partners or for the accommodation of third persons, all the cases agree that the burden of proving the holder's knowledge of that fact rests upon the partnership. That the execution is by an agent is as apparent upon the face of the paper in such cases as in that of a certified check; because a partnership can only act in its partnership name through agents. . . . The question is not in such cases whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent from disputing facts which show that the act was authorized. There is no analogy between these partnership cases or the case before the court and cases where the paper is forged. The fact of the agency and the trust and confidence reposed by the principal in the agent create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge. The giving a note in the partnership name by one of the partners is a virtual representation that it is given in the partnership business, and if negotiable, the representation is deemed in law to have been made to every subsequent bona fide holder of the note. The State of Illinois *v.* Delafield, 8 Paige, 527, s. c. in error, 2 Hill, 159, is another illustration of the same principle. An agent of that state was authorized to dispose of certain bonds, but was not to sell them below par or on credit. He sold them to Delafield on time and at a sacrifice. The state filed a bill against Delafield for relief, and applied to the Court of Chancery for an injunction to restrain the defendant from negotiating the bonds on the ground that if negotiated the state would be liable to pay them. The defendant's counsel insisted that if the bonds were void in the hands of Delafield, they would be equally so in the hands of any person to whom he might transfer them. The Chancellor nevertheless granted the injunction, saying that if the securities should pass into the hands of a bona fide holder, the state would be equitably and legally bound to pay them. On appeal to the Court for the Correction of Errors the decision of the Chancellor was affirmed by a nearly unanimous vote. It would be difficult, I think, to discover any valid distinction in principle between this case and the one we are considering. The purchaser of the bonds from Delafield would equally with Delafield himself be presumed to know the limits of the authority conferred upon the agent; but it must have been held that he would not be bound to inquire as to the extrinsic facts attending the sale or negotiation of the bonds.' But the better ground is agency, not estoppel.

another.[1] The cashier had gone to the paying bank; and upon the faith of his acts and declarations the bank had parted with its money. The misfortune occurred through the cashier of the certifying bank, and the loss should fall upon that bank. In a subsequent portion of his opinion the learned judge said that by the law merchant of this country the certificate of the bank that the paper was good was equivalent to acceptance. It implied that the check was drawn upon sufficient funds in the hands of the drawee, that they had been set apart for its satisfaction, and that they should be so applied whenever the paper was presented for payment. It was an undertaking that the check was good then, and should continue good; and this agreement was as binding on the bank as its notes of circulation, or a certificate of deposit payable to the order of the depositor. The object of the certification was to enable the holder to raise money; the transferee took it with the same readiness and sense of security that he would have taken the notes of the bank; and it was available to him for all the purposes of money. The certifying bank intended these consequences, and it was liable accordingly.[2]

Any language, it has indeed been said, whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, estops the bank thereafter as against a bona fide holder of the check from denying the want of funds to pay the same.[3]

§ 4. *Transfer by Indorser after Liability fixed.*

A case of estoppel arises also where an indorser, whose liability has been fixed by notice of non-payment, again becomes

[1] Swan *v.* North British Co., 7 Hurl. & N. 603; s. c. 2 Hurl. & C. 175; Hern *v.* Nichols, 1 Salk. 289.

[2] The following authorities were cited in support of the ruling: Bickford *v.* First National Bank, 42 Ill. 238; Willets *v.* Phœnix Bank, 2 Duer, 121; Barnet *v.* Smith, 30 N. H. 256; Farmers' Bank *v.* Butchers' Bank, 14 N. Y. 624; s. c. 16 N. Y. 125; Meads *v.* Merchants' Bank, 25 N. Y. 143; Brown *v.* Leckie, 43 Ill. 497; Girard Bank *v.* Bank of Penn., 39 Penn. St. 92. See also Clarke National Bank *v.* Bank of Albion, 52 Barb. 592.

[3] Pope *v.* Bank of Albion, 59 Barb. 226, 238.

possessed of and negotiates the paper upon a representation of having received due notice of dishonor. The late case of St. John *v.* Roberts[1] will illustrate the point. This was an action against the defendants as indorsers of a promissory note payable to the defendants. Before the note matured it was indorsed by the defendants and deposited in bank; and on maturity payment was demanded of the maker, and being refused the paper was protested and due notice given to the defendants. They then placed the note with the protest annexed in the hands of an auctioneer for sale. He sold it to the plaintiff, who paid the price and received the note. Judgment was given in the court below for the defendants on the ground that there had been no *new* demand of payment of the note of the maker and notice thereof to the indorsers after the transfer and delivery of the note to the plaintiff. But this judgment was reversed by the Court of Appeals.[2]

[1] 31 N. Y. 441.

[2] 'The Superior Court,' said Davies, J. in delivering the opinion, 'treated the case as if there had been a new contract by the defendants of indorsement at the time of the transfer and delivery of the note to the plaintiff. It is well settled that when a note once due is indorsed and transferred, the indorser cannot be made liable upon his contract of indorsement unless there has been subsequent to such indorsement and transfer a demand of payment of the maker and notice to the indorser. Leavitt *v.* Putnam, 3 Comst. 494. In this case there was no new contract of indorsement on the transfer and delivery of this note to the present plaintiff. The indorsers themselves put this note upon the market after they had been legally and duly charged thereon and made liable as indorsers thereon, with the evidence of such liability attached. Such act of theirs was a representation of their liability on the note, and they are now estopped in good faith and sound morals from denying such liability. The plaintiff purchased the note as thus presented, and they have received the amount of the purchase-money and should not be permitted to deny their liability.'

After referring to Williams *v.* Mathews, 3 Cowen, 252, as a case so nearly analogous as to be decisive on authority, the learned judge proceeded to say: 'In the present case the plaintiff dealt with Nicolay the auctioneer, the presumptive holder of the note, and the plaintiff had no actual notice or any notice to put him on inquiry as to who was the holder or seller of the note. He had a right to assume that all the parties to the note were bound for its payment, and in this faith he made the purchase of it. . . . We place our judgment in this case upon the ground that the defendants are estopped by their acts from controverting their liability upon the note as indorsers thereof.' An indorser may also be held liable by his conduct, though he has in fact been discharged for want of notice. Libbey *v.* Pierce, 47 N. H. 309.

CHAPTER XVII.

LEGAL EFFECT OF CONTRACT: TAKING POSSESSION.

We have now to consider the second class of estoppels by contract, — that class in which the estoppel arises, not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution; and first, of the effect of taking possession of property from the hand of another.

§ 1. *Estoppel of Tenant to deny Landlord's Title.*[1]

Creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord.[2] We have already alluded to the fact that this estoppel is of modern origin.[3] In the time of Lord Coke the only way in which a tenant could be estopped to deny the title of his landlord was by the acceptance of a sealed lease. That this estoppel took its rise from the seal, and differed in origin from the modern estoppel, is evident from the fact that in the case of a lease by deed-poll the estoppel was confined to the party sealing; while it is certain that at the present time it is immaterial to the existence of the estoppel whether the lease be by deed-poll or by indenture, or even whether there be any written lease at all. And again, the estoppel then terminated with the expiration of the lease;

[1] The estoppel upon the landlord has already been considered under Title by Estoppel. Ante, pp. 390-394.

[2] Hatch *v.* Bullock, 57 N. H. 15; Betts *v.* Wurth, 32 N. J. Eq. 82; Terrett *v.* Cowenhaven, 79 N. Y. 400; Nims *v.* Sherman, 43 Mich. 45; Campau *v.* Lafferty, ib. 429; Ward *v.* Ryan, 10 Ir. R. C. L. 17. The transaction, for the purpose of the estoppel, must not be contrary to law. Shorman *v.* Eakin, 47 Ark. 351; Dupas *v.* Wassell, 1 Dill. 213.

[3] Ante, pp. 453, 454. See also the article already cited from the 5th Am. Law Rev. Without continually citing this article we shall draw from it considerably in the opening pages of this chapter; and we recommend a careful reading of it.

while at the present day the estoppel continues until the surrender of possession. And the tenant's estoppel of the present day arises as well in regard to personalty as to realty.[1]

Moreover, even though there was a lease by indenture, no estoppel arose against the tenant except in actions of which the demise was the gist, such as covenant, or in the avowry in replevin, and similar cases. It arose only upon the indenture, and then only when the indenture was specially pleaded or replied to the plea of 'nil habuit in tenementis.'[2] The estoppel, therefore, could not arise in debt for rent; for the indenture could not be the foundation of such an action. 'How narrow and technical the distinction established by this rule was,' says the writer in the American Law Review, already referred to, 'will appear on referring to the ancient precedents of debt for rent. In Carson *v.* Faunt[3] the declaration avers a demise, setting out specifically the date, term, premises, and rate of rent; yet nil habuit, etc. was pleaded, and issue was joined thereon. In Offley *v.* Ormes[4] the indenture is set out in full; yet nil habuit, etc. was a good plea. . . . Indeed, the entire distinction between the pleading when estoppel would and when it would not arise seems to have been found in the technical averment of the breach; that in debt concluding that such an amount had accrued and was due, etc.; and that in covenant that the covenant recited had been broken, etc.'

It is clear, then, that the tenant's estoppel of the present day is not the same as that of the early common law. It seems conclusive also against the idea that the modern estoppel originated in the feudal tenures,[5] that the feud required an estate of freehold; and the extremely flexible and varied character of the doctrine prevailing at present is in strong contrast to the narrow technical rules of the feudal tenures.

The modern origin of the present estoppel is confirmed by the cases. In the familiar case of Doe d. Knight *v.* Smythe,[6] an action of ejectment, Mr. Justice Dampier said: 'It has been

[1] Ryder *v.* Mansell, 66 Maine, 167.

[2] Palmer *v.* Ekins, 2 Ld. Raym. 1550; Veale *v.* Warner, 1 Wms. Saund. 325, n. 4; Syllivan *v.* Stradling, 2 Wils. 208.

[3] 1 Lilly, Ent. 168 (1698).

[4] Ibid. 179.

[5] 1 Washburn, Real Prop. 356.

[6] 4 Maule & S. 347 (1816).

ruled often that neither the tenant nor any one claiming under him can dispute the landlord's title. This, I believe, has been the rule for the last *twenty-five years*, and, I remember, was so laid down by Buller, J. on the western circuit.' The case referred to was perhaps Doe d. Bristow *v.* Pegge,[1] decided in 1785, in which Mr. Justice Buller said: 'An objection has been taken at the bar that the plaintiff in ejectment must recover by the strength of his own title. The old cases certainly say so; but for the last forty or fifty years constant exceptions to this rule have been admitted. One case, which is received as clear law, is that of a tenant who cannot set up the title of the mortgagee against the mortgagor, because he holds under the mortgagor and has admitted the title. There was a case before me at Guildhall, and I believe another upon the Oxford circuit of the same nature, where a lessee for years had got possession of some mortgage deeds, and endeavored to set up that title against the mortgagor; but though this showed that the plaintiff had no right to recover against the mortgagee, yet I permitted him to do so in that instance, and the decision was acquiesced under.' It seems, then, that the origin of the rule in ejectment cannot be traced further back than to the middle of the last century; the writer in the American Law Review, after mentioning this fact, states that in actions for use and occupation the rule was held a quarter of a century earlier.

It is also shown by the same writer that the doctrine did not originate in the statute passed in 1738 for the relief of landlords,[2] as was supposed by Mr. Justice Woodruff in Moffat *v.*

[1] Reported in note, 1 T. R. 758.

[2] It was enacted by § 14 of this statute, that, 'to obviate some difficulties that may at times occur in the recovery of rents where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant, in an action on the case [assumpsit] for the use and occupation of what was so held and enjoyed; and if in evidence on the trial of such action, any parol demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered.' And by § 22, 'it shall be lawful for all defendants in replevin to avow and make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent

Strong,[1] and this appears from the fact that in Lewis *v.* Willis,[2] tried in 1752, the case of Prichard *v.* Houlditch[3] was referred to to sustain a demurrer to a plea of nil habuit in tenementis, in indebitatus assumpsit for use and occupation; a case tried twelve years prior to the passage of the act. In Gibson *v.* Kirk[4] Lord Denman says that assumpsit for use and occupation was simply *protected* by the statute from being defeated by proof of a certain rent under a parol demise or agreement not under seal, and that before the statute actions of assumpsit for the occupation of land had been frequently held maintainable.[5] The fact is also mentioned that *debt* for use and occupation antedated the statute.

The conclusion appears to be justified that the origin and character of the modern estoppel of the tenant is to be found in this ancient action of assumpsit for use and occupation. In this form of action what was sought to be recovered was, not technically rent, but compensation from day to day for actual enjoyment. But to the maintenance of the action the relation of landlord and tenant must have been established; and when established, the modern estoppel in pais arose. *Enjoyment by permission* is the foundation of the action, and is therefore the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel: first, possession; secondly, permission; when these conditions are present the estoppel arises.[6]

during the term wherein the rent distrained for was incurred, which rent has been and still remains due . . . without setting forth further the grant, terms, demise, or title of the landlord.' 11 Geo. 2, c. 19.

[1] 9 Bosw. 57, 65.

[2] 1 Wils. 314.

[3] Hil. T. 13, Geo. 1 (1727).

[4] Q. B. 840, 855.

[5] See also Churchward *v.* Ford, 2 Hurl. & N. 446; Curtis *v.* Spitty, 1 Bing. N. C. 15; Beverly *v.* Lincoln Gaslight Co., 6 Ad. & E. 839, note; Egler *v.* Marsden, 5 Taunt. 25.

[6] Morrison *v.* Bassett, 26 Minn. 235; Hussman *v.* Wilke, 50 Cal. 250. It has been suggested, and with much soundness apparently, that the estoppel will arise even if there appears no entry or possession by the tenant if he does not show that he could not get possession. 5 Am. Law Rev. 16; Varnam *v.* Smith, 15 N. Y. 327, 331. In this case Denio, C. J. observed: 'If the defendant in his answer had confined himself to a denial that the plaintiff at the time of the demise had any estate in the premises, the question would be presented whether the ancient rule of the common law, to which I have referred, prevails at this day. There would not be

It will now be an easy matter to dispose of some of the cases. In Davis *v.* Tyler[1] the plaintiff brought replevin for taking his goods. The defendant avowed the taking as a distress for rent due. The plaintiff pleaded to the avowry that the land was not the defendant's; to which the defendant replied by way of estoppel that the plaintiff had accepted from the defendant a *written* lease for the premises signed by both parties, and that the plaintiff occupied the premises under the lease. There was a demurrer to the replication on the ground that a *sealed* lease had not been alleged; and the demurrer was sustained. The court said that no instrument in writing, not under seal, could be pleaded as an estoppel; and that the defendant, therefore, should not have replied the unsealed lease by way of estoppel, but should have taken issue upon the allegation that the premises were not his freehold.

This decision proceeds upon the mistaken assumption that the seal is the foundation of the tenant's estoppel, the court no doubt having in mind the estoppel of the early common law. And the same remark is applicable to Davis *v.* Shoemaker,[2] and to all that class of cases. It is worthy of notice, however, that the case just cited was an action of debt for rent; and it was for a long time supposed in England that in this action nil habuit was a good plea.[3] There is ground for doubt whether such a doctrine would now be held in England.[4] And it is quite clear that it does not prevail at the present day in America.[5]

In the recent case of Page *v.* Kinsman[6] the position was taken that the estoppel upon a tenant holding under a lease by indenture did not outlast the term; but that after the ex-

much appearance of justice in holding that where one has taken a written lease of premises and agreed to pay the rent, but has not thought proper to avail himself of the right he had thus contracted for by going into possession, where he might have done so without hindrance from any one, he can defend against his engagement by showing that there was a defect in the lessor's title, and that he was not really seised of the land.'

[1] 18 Johns. 490.

[2] 1 Rawle, 135.

[3] Syllivan *v.* Stradling, 2 Wils. 208; Smith *v.* Scott, 6 C. B. N. S. 771, obiter.

[4] See 5 Am. Law Rev. 15.

[5] Moore *v.* Beasley, 3 Ohio, 294; Gray *v.* Johnson, 14 N. H. 414; Varnam *v.* Smith, 15 N. Y. 327.

[6] 43 N. H. 328. See Carpenter *v.* Thompson, 3 N. H. 204; Gray *v.* Johnson, 14 N. H. 421; Russell *v.* Fabyan, 27 N. H. 537; Accidental Death Ins. Co. *v.* Mackenzie, 5 L. T. N. S. 20; S. C. 10 C. B. N. S. 870, Am. ed.

piration of the term the tenant might set up his own title to the premises without giving back the possession. But the court in this case, misconceiving the true origin of the modern doctrine, rests the decision upon the rule in Coke that 'if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended. For by the taking of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines.'[1] The seal being the efficient element of estoppel in the early common law, the estoppel was removed when, by the expiration of the term, its power terminated. But permissive *possession* being the ground of the modern estoppel, it is clear that the estoppel will prevail so long as such possession continues,[2] though the contract of lease was void.[3] And the authorities upon this point are numerous.[4] We proceed now to a more detailed examination of the modern doctrine of the tenant's estoppel, and, as heretofore, by a presentation of the cases.

Payment of rent is evidence of permissive occupation, and when unaccompanied by fraud or mistake establishes the relation of landlord and tenant,[5] and is the ordinary evidence upon which the estoppel arises, though it is by no means the only evidence upon which the estoppel may be founded.[6] In

[1] Coke, Litt. 47 b.

[2] Bishop *v.* Lalouette, 67 Ala. 197; Littleton *v.* Clayton, 77 Ala. 571 (secret surrender and collusive resumption of possession). There were other matters involved in Page *v.* Kinsman, however, and the decision was in fact correct, though this erroneous ground was taken.

[3] Crawford *v.* Jones, 54 Ala. 459.

[4] See Bailey *v.* Kilburn, 10 Met. 176; Miller *v.* Lang, 99 Mass. 13; Doe d. Bullen *v.* Mills, 2 Ad. & E. 17; Fleming *v.* Gooding, 10 Bing. 549; 5 Am. Law Rev. 21, 22, and cases cited; Morrison *v.* Bassett, 26 Minn. 235; Love *v.* Law, 57 Miss. 596; Nims *v.* Sherman, 43 Mich. 45.

[5] Doe d. Jackson *v.* Wilkinson, 3 Barn. & C. 413; Cooper *v.* Blandy, 4 Moore & S. 562; Killoren *v.* Murtaugh, 64 N. H. 51; Lucas *v.* Brooks, 18 Wall. 436; Dunshee *v.* Grundy, 15 Gray, 314; Whalin *v.* White, 25 N. Y. 462. Payment of rent may also be conclusive evidence that the tenant is an assignee of a lease. Williams *v.* Heales, L. R. 9 C. P. 177. What constitutes a letting in cases of payment on shares, so as to raise an estoppel, see Strain *v.* Gardner, 61 Wis. 174; Jackson *v.* Brownell, 1 Johns. 267; Overseers *v.* Overseers, 14 Johns. 365; Taylor *v.* Bradley, 39 N. Y. 129. Judgment for the plaintiff in a suit for unlawful detainer conclusively establishes the relation of landlord and tenant between the parties. Norwood *v.* Kirby, 70 Ala. 397.

[6] See e. g. Conwell *v.* Mann, 100 N. Car. 234.

the English case first cited, an action of ejectment, it appeared that, upwards of thirty years before, the defendant had enclosed a piece of waste ground of which one Trafford was owner. Subsequently the plaintiff bought the land of Trafford, and several years afterwards demanded rent of the defendant, who paid it. Six years later the plaintiff gave notice to quit, with which the defendant refused to comply, claiming that he had a right to the close. The court held the latter estopped by the payment of the rent.[1]

The rule that the estoppel of the tenant depends upon the existence of a seal having become obsolete, it is plain that the doctrine of mutuality in the case of competent parties is fully applicable to the modern relation of landlord and tenant. And as this relation is one of contract, it follows that the same rules concerning the competency of parties prevail as in the case of estoppels by deed. A lease, like other contracts, is binding only upon parties sui juris; and persons under disability not being bound by the contract are not estopped to deny its validity.

On the other hand, since a contract made with a person under disability, when not absolutely void, may be avoided only by the incompetent party, and is binding upon the other, the latter, in the case of a tenancy, will be estopped to deny the validity of the lease until its obligatory force is repudiated by the opposite party.[2] In the case first cited a parol gift of land had been made by a third person to an infant, and the infant's mother had been put in possession under an agreement with the third person to hold the land for her son; and the court held that though the technical relation of landlord and tenant had not been created, the mother was still estopped before the surrender of possession from denying her son's title.

As in other cases, the estoppel binds the tenant's privies as well as the tenant. The rule is illustrated in Doe d. Bullen *v.*

[1] 'The payment of rent,' said Holroyd, J. 'was an acknowledgment that the occupation was by permission. Had the defendant known that the lessor of the plaintiff could not otherwise prove a tenancy, it is probable that he would not have paid the rent; but having paid it, the tenancy is acknowledged.'

[2] Russell *v.* Erwin, 38 Ala. 44. See Grant *v.* White, 42 Mo. 285.

Mills.[1] Certain premises were in the possession of a lessee under an indenture from Bullen, the plaintiff. Subsequently the defendant laid claim to the premises, and offered the lessee £20 if he would surrender to him. The offer was accepted, and the defendant took possession. The plaintiff now brought an action of ejectment by reason of a forfeiture caused by the non-payment of rent by the original lessee; and the defendant attempted to prove his own title to the land. The court refused to allow him to do so. Mr. Justice Taunton said that the defendant having paid £20 for the lease, and then having taken possession, had put himself in the situation of an assignee of that lease, and was as much estopped from disputing the title of the landlord as the immediate lessee.[2] Mr. Justice Patterson said that the act of the defendant by which he was let into possession was either an act of collusion to enable him to dispute the landlord's title, or it was a purchase by him of the lessee's interest; and in either case the defence was inadmissible.[3]

If the tenant sublet the premises, the sub-lessee cannot dispute the title of the original lessor.[4] In Barwick *v.* Thompson, just cited, the master of a school, holding under the mayor and aldermen of the borough in their capacity of guardians and governors of the school, demised the school lands to the defendants, who paid rent to the master. In an ejectment by the mayor and aldermen, the defendants contended that they did not hold under the plaintiffs, but under the master; but that even if they held under them, there was no reason why they should not be permitted to inquire into the validity of their title, since all the evidence of title had been given by the master, and in this respect the case differed from the ordinary one where a tenant was not permitted to impeach his landlord's title. But the court was of opinion that as the defendants held under the master, who had been appointed by the mayor and aldermen, they ought not to dispute the title of the latter, and that it was immaterial whether the defendants held immediately under the

[1] 2 Ad. & E. 17.

[2] Otis *v.* McMillan, 70 Ala. 46, 53; Dobson *v.* Culpepper, 23 Gratt. 352.

[3] See Doe d. Knight *v.* Smythe, 4 Maule & S. 347.

[4] Barwick *v.* Thompson, 7 T. R. 488.

mayor and aldermen, or under the master who claimed under them.

The doctrine of privity is well illustrated in a recent case in the English Common Pleas.[1] The action was ejectment under the following circumstances: The plaintiffs let land to one Budd, who continued to hold over and pay rent for several years after the expiration of the plaintiffs' title, which occurred in 1859. In 1863 Budd sublet the premises to the defendant, who paid rent to him. In 1864 the plaintiffs gave notice to Budd to quit, which he did. There was no evidence that the defendant had paid rent to any one subsequently to that date. Judgment was given for the plaintiff.[2]

Passing to the fundamental rule that a tenant cannot while in possession set up an outstanding title to overthrow the title of one under whom he holds, or otherwise dispute such title,[3] — that

[1] London & Northwestern R. Co. *v.* West, L. R. 2 C. P. 553. Further, of privity, see Woodruff *v.* Erie Ry. Co., 73 N. Y. 609; Pate *v.* Turner, 94 N. Car. 47; Bishop *v.* Lalouette, 67 Ala. 197; Norwood *v.* Kirby, 70 Ala. 397 (administrator and administrator de bonis non); White *v.* Barlow, 72 Ga. 887 (purchaser from tenant, with notice); Blake *v.* Sanderson, 1 Gray, 332; Lunsford *v.* Alexander, 4 Dev. & B. 40; Rennie *v.* Robinson, 1 Bing. 147; Doe d. *v.* Wheble *v.* Fuller, 1 Tyr. & G. 17.

[2] Willes, J. said: 'It seems to me that the question is whether, if Budd had been the defendant instead of West, he could have resisted this ejectment, for West came in under Budd; and since no change has taken place in the right of the different parties since his tenancy commenced, he cannot dispute that the rights of Budd have duly vested in him. Would, then, Budd be able to dispute the plaintiffs' title? If his tenancy had commenced after 1859, when the land is alleged to have vested in the adjoining owner, there is no doubt that he would have been estopped from doing so, since a tenant cannot dispute his landlord's title except by showing that such title has terminated since the commencement of the tenancy. In this case the answer is to be found in a conclusion of fact, namely, that as the question is raised by a mere stranger who does not even allege that he has any title himself, we ought to conclude if necessary that Budd intended to remain tenant to the plaintiffs after 1859, and that there was therefore a new tenancy in law from year to year created subsequently to the year 1859. He therefore could not have disputed the plaintiffs' title, and neither can the defendant.'

[3] Helena *v.* Turner, 36 Ark. 577; Baker *v.* Barclift, 76 Ala. 414; Caldwell *v.* Smith, 77 Ala. 157; Littleton *v.* Clayton, ib. 571; Benton *v.* Benton, 95 N. Car. 559; Allen *v.* Griffin, 98 N. Car. 120. But in Allen *v.* Griffin it is said, quoting Davis *v.* Davis, 83 N. Car. 71, that 'the rule does not preclude the tenant from showing an equitable title in himself, or such circumstances as under our former system would call for an interposition of a court of equity for relief.' Quære whether this means anything more than is to be inferred from the qualifications infra of the rule?

rule is illustrated in Doe d. Ogle *v.* Vickers,[1] an ejectment for land in Shropshire. The facts were these: In 1824 the defendant executed a mortgage in fee to the plaintiff of the premises in question. Subsequently other parties brought ejectment for two undivided thirds of the premises against the defendant, who remained in possession claiming by title anterior to the mortgage mentioned. The plaintiffs in that case obtained judgment subject to the award of a barrister, who was to direct what sort of lease should be executed by the successful parties to the defendant. The arbitrator awarded a lease which was executed and had not expired at the commencement of the present action. The defendant having suffered judgment for one third, contended that the plaintiffs could not recover the other two undivided thirds, as the defendant held them by a title acquired subsequently to the mortgage, upon which the mortgage could not operate. But judgment was given for the plaintiff.[2]

In a case in the English Common Pleas[3] the defendant to an avowry for rent pleaded that 'before the lessor (who claimed title under a pretended agreement between him and one T R) had anything in the premises, and before the demise by the lessor to the lessee, T R mortgaged them in fee to J C; that the mortgage being forfeited, notice of the forfeiture being given to the lessee, and the lessee having been required to attorn and having attorned to the mortgagee, he distrained for the rent, when the lessee paid him to save the goods from being sold.' The court held the plea bad.[4]

[1] 4 Ad. & E. 782.

[2] See Doe d. Hurst *v.* Clifton, 4 Ad. & E. 809, 813, holding that the case is not different where the deed is set up by a mere nominal party for the benefit in reality of the mortgagor.

[3] Achorne *v.* Gomme, 2 Bing. 54.

[4] Best, C. J. having stated that the plea amounted to a plea of nil habuit in tenementis, said that it had been urged that what had been done by the plaintiff was equivalent to payment, and that the plea was nothing more than a special plea of riens in arrear; 'but if so,' he replied, 'it may be equally contended that non tenuit is a plea of riens in arrear. Now, it is quite clear that a party cannot plead indirectly that which he cannot plead directly; he cannot by adding words effect that which he would not be permitted to effect if it was stated simply; and the rule which prohibits a tenant from disputing in a court of law the title of his landlord is a wise rule, tending to general convenience especially when there is another court in which he may insist on any equities which the case may involve. I am aware that

The rule of estoppel, again, applies as well to cases in which the tenant has obtained possession by indirection, e. g. by fraud, as to ordinary cases of lease.[1] The case cited was an ejectment, in which it appeared that the defendant applied to the plaintiff, then in possession of the premises, for the privilege of getting vegetables from the garden; and that having obtained the keys, he fraudulently took possession and set up a claim to the land. The court refused to hear it.[2]

there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that the landlord could not justify a distress. In all of them, however, the right of the landlord to demise has been admitted, and the plea has been either that his title has since expired or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent. These cases, therefore, rather confirm than impeach the general rule; but the tenant here broadly disputes the lessor's right to demise.' The Chief Justice probably referred among other cases to Taylor *v.* Zamira, 6 Taunt. 524, in regard to which Park, J. said: 'In Taylor *v.* Zamira the land was expressly subjected to distress by a charge created before the lessor's title commenced. In the present case unless the tenant had attorned, though the mortgagor might have evicted, he could not have distrained.'

[1] Doe d. Johnson *v.* Baytūp, 3 Ad. & E. 188; s. c. 4 Nev. & M. 837.

[2] Mr. Justice Patterson said: 'In the case of a person who has become tenant there is no doubt as to the law. Doe d. Knight *v.* Lady Smythe, 4 Maule & S. 347, shows that he must first give up possession to the party by whom he was let in, and then if he or any one claiming by him has a title aliunde, that title may be tried by ejectment. It was held in that case, not that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession. If the defendant here has any right, she might in the first instance have brought ejectment or have entered on Mrs. Johnson and disseised her, and maintained the possession. But she takes neither course. She fraudulently obtains permission to go upon the premises, and then turns upon the lessor of the plaintiff and insists upon holding the land. The rule as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant.' Mr. Justice Coleridge said that there was no distinction between the case of a tenant and that of a common licensee. The licensee by asking permission admitted that there was a title in the landlord. 'Suppose,' he proceeded to say, 'that under the license an undisturbed possession were enjoyed for some considerable time, and an action were brought for use and occupation, could the licensee dispute the licensor's right of action? The law would imply a tenancy under such circumstances. Then if there be no distinction between the cases of a licensee and a tenant, do the circumstances here present an irresistible case of license? Here is a party quietly in possession. The defendant comes and asks for the key. If she had intended to make a claim of title, she might have come as a trespasser to disseise, and having entered might have stood upon her right. But here that was not done; and under the circumstances of this case the defendant before she could dispute the title was bound to put the lessor of the plaintiff in the situation in which she stood before the leave was granted.'

The estoppel of the tenant and his privies, however, relates only to the title of the landlord at the time the lease was granted; the tenant's acceptance of the lease is simply an admission that his landlord had sufficient right to lease the property at that time. That the tenant may show that his landlord's title has since in any way expired is shown, among other cases,[1] by the case of Hopcraft *v.* Keys.[2] The action was replevin to try the validity of a distress for rent. Issue was joined on the plaintiff's plea of non tenuit. The facts were these: Hopcraft was let into possession of a house by Hawkins, February 12, 1831, as tenant for a year; and the house being unfinished, Hawkins undertook to finish it by a certain time and to give Hopcraft the option of a lease at the end of the year. Hawkins had no other title to the premises than an agreement with one Kent, bearing date September 17, 1830, by which Kent agreed to grant him a lease after Hawkins should have finished the houses described in the agreement; reserving to himself an express power of re-entry, and avoiding the agreement if the houses were not completed within six months from the date of the agreement. The houses were not finished within the time, and Kent on the 2d of April, before any rent was due from Hopcraft to Hawkins, re-entered for the condition broken and turned out all the tenants, Hopcraft among them. Kent thereupon put a man in possession of the house which had been occupied by Hopcraft. The house was subsequently finished, vacated, and leased again to Hopcraft by Kent upon a new agreement and for a different rent. The Chief Justice, with whom the other judges concurred, said that it was competent for the plaintiff to show that his landlord had a defeasible title only, and that such title had been actually defeated before any rent became due, and that the rule of estoppel could not apply to the case where the tenant had been actually turned out of

[1] Emmes *v.* Feeley, 132 Mass. 346; Hilbourn *v.* Fogg, 99 Mass. 11; Lamson *v.* Clarkson, 113 Mass. 348; Farris *v.* Houston, 74 Ala. 162; Caldwell *v.* Smith, 77 Ala. 157, 166; Clarke *v.* Clarke, 51 Ala. 498; St. John *v.* Quitzow, 72 Ill. 334; Ryder *v.* Mansell, 66 Maine, 167; Presstman *v.* Silljacks, 52 Md. 647; Delmege *v.* Mullins, 9 Ir. R. C. L. 209, 214. Tenant at will may show that his landlord's title has expired. Emmes *v.* Feeley, supra.

[2] 9 Bing. 613.

possession and kept out a considerable time, and had afterwards entered under a new agreement made bona fide with another person.

The case of Claridge *v.* Mackenzie [1] presents another phase of the same important rule. The action was trespass for two distresses for rent. The facts, in brief, were that the plaintiff having derived possession from a third person paid rent to the defendant, who was in fact a termor. After the latter's term had expired, but not to the knowledge of the plaintiff, the plaintiff entered into an agreement with the defendant for a tenancy, and in pursuance thereof paid rent to him. The court held that the plaintiff was not estopped to show that the distresses complained of were illegal, on the ground that the defendant's title had expired.[2]

[1] 4 Man. & G. 143.

[2] Chief Justice Tindal came to this conclusion upon two grounds: First, that there was no new taking of the premises by the plaintiff or any letting into possession by the defendant; and secondly, that even assuming there was a new taking or letting into possession, the jury had found that the transaction had taken place without a knowledge on the part of the plaintiff of the circumstances. 'Upon the first point,' he said, 'I think it was competent for the plaintiff to show that the defendant's title had expired. The plaintiff was in possession of the premises; and after the expiration of the defendant's interest he continued to occupy as tenant by sufferance under the party who was entitled to the intermediate term of three quarters of a year. The witness Richards speaks of a new agreement having been entered into between the plaintiff and the defendant that the former should continue in possession as tenant to the latter; but there was no new possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is, in fact, a remaining in possession of premises which had been formerly occupied by the tenant. . . . In effect all that the plaintiff proposes to do in this case is to show that the defendant at one time had a good title, which has since expired.' Mr. Justice Coltman said: 'If the plaintiff was not let into possession by the defendant, it is clear that he is not precluded from showing that her title is at an end. What, then, is the meaning of being let into possession? The plaintiff, it is admitted, was not let into corporeal possession by the defendant; he had been let in by Tillbury, quite independently of Mackenzie. But then it is argued that in July, 1838, the plaintiff entered into an agreement to take the premises from the defendant; and I think that such must be considered to be the result of the evidence. And if she had a legal right at that time and might have turned the plaintiff out of possession, I am not prepared to say but that he must have formally surrendered to the defendant. But the infirmity of the defendant's case con-

The tenant, again, may purchase the property from the landlord, and set up the title thus acquired against him.[1] In the case first cited, an action of covenant for rent, the defendant offered to show that he had become the purchaser at execution sale of the reversion of a portion of the demised premises, and the Supreme Court held the evidence admissible in mitigation of damages. And it was said that if the purchase had covered the entire reversionary interest of the landlord, the fact could have been alleged, and would have constituted a perfect bar to the action. Mr. Justice Cowen, speaking for the court, said that the tenant could not deny that the landlord had a right to demise at the time the lease was given; nor could he defend on the ground that he had acquired an outstanding title adverse to that of the landlord. But this was the extent of the doctrine. If the landlord parted with his title pending the lease, the tenant would be bound to pay rent to the assignee; and should the tenant then buy in the assignee's right, the lease would be extinguished. And the result would be the same if the landlord should sell and release to the lessee. No action would lie for rent in these cases. And, therefore, had there been a sheriff's sale of the whole reversion, and had the defendant redeemed or purchased under the judgment, no action could have been sustained; for a purchase or acquisition of title under a judgment against the lessor was the same thing as if the lessor had granted by deed.

However, a tenant bound to pay the taxes, and neglecting to do so, cannot buy in the title at tax sale, and set it up against his landlord. This would be to profit by his own wrong.[2]

The tenant is not estopped to allege that he was let into possession under a title since acquired by him, under which subordinately the landlord claims.[3] In the case cited the plaintiff in

sists in this, that at the time of this agreement she had in fact no power to turn the plaintiff out of possession, and I think, therefore, that he cannot be said to have been let in by her. The question then is, Was this agreement made under a mistaken notion as to the facts? This point was properly left to the jury, and they have found in the affirmative.'

[1] Nellis *v.* Lathrop, 22 Wend. 121; Tilghman *v.* Little, 13 Ill. 239; Farris *v.* Houston, 74 Ala. 162.

[2] Haskell *v.* Putnam, 42 Maine, 244.

[3] Ford *v.* Ager, 2 Hurl. & C. 279.

ejectment claimed title to the premises in dispute through one Quinton Ford, by a conveyance in fee. Quinton had acquired the title by being put into possession by his father, and occupying the premises for twenty-five years without payment of rent or other acknowledgment of the father's title. The latter, after putting his son into possession, mortgaged the property. After Quinton had conveyed to the plaintiff, and after he had attorned to him as tenant, he gave up possession in consideration of a sum of money to the representatives of the mortgagor (his father) and of the mortgagee, who united in a conveyance to the defendants. The question was whether the defendants were estopped by reason of their relation to the plaintiff. The court decided that they were not. Mr. Baron Channell said that the case was distinguishable from Doe d. Bullen *v.* Mills.[1] Although up to a certain point it resembled that case in its facts, it differed from it in the circumstances under which the plaintiff's tenant was originally let into possession. The defendants did not seek to dispute the plaintiff's title, but to show an affirmative title in themselves from which any title the plaintiff had was derived.

It is well settled that a tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without (1) actually and openly[2] surrendering possession to him, or (2) being evicted by title paramount, or attorning thereto, or (3) at least giving notice to his landlord that he shall claim under another and a valid title.[3] In Littleton *v.* Clayton the tenant, by collusion with another, removed from the premises at the termination of the lease, for a few days, without the landlord's knowledge, and then by the same collusion resumed possession. It was held that this was not enough to break the force of the estoppel; the tenant must act in good faith, and restore the landlord to the position he held at first.[4]

In Morse *v.* Goddard, just cited, to illustrate the second case, the plaintiff sued for a month's rent, and the defence was that

[1] 2 Ad. & E. 17; ante, pp. 512, 513.

[2] Littleton *v.* Clayton, 77 Ala. 571.

[3] Miller *v.* Lang, 99 Mass. 13; Hilbourn *v.* Fogg, ib. 11; Morse *v.* Goddard, 13 Met. 177.

[4] 'Mere leaving possession and resuming it a short time afterwards, without notice to the landlord, or giving him an opportunity to take possession, is not sufficient.' Ib. Clopton, J.

the tenant had been ousted by persons having a paramount title before the commencement of the time for which the rent was claimed. The defendant offered to show that persons having a valid title paramount to that of the defendant and his lessor the plaintiff, and having an immediate right of entry and of possession under it, made an actual entry on the premises, and required the defendant to pay rent to them from the time of such entry, or quit the premises. But it was objected that a tenant could not contest his landlord's title, or set up a paramount adverse title in a third person. The court, however, received the evidence.[1] The instruction to the jury had been that if the defendant bona fide had yielded possession of the premises to the third persons to prevent being actually expelled, of which fact the plaintiff had notice, and if upon the evidence the third persons had a good title paramount to that of the defendant and of the lessor, and the right of immediate possession, then their

[1] Chief Justice Shaw, speaking for the court, observed that the general doctrine of estoppel upon a tenant was not inconsistent with another rule, that where there is an eviction or ouster of the lessee by title paramount which he cannot resist, it is a good bar to the demand for rent, on the plain ground of equity, that the enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit, he cannot be held to pay the compensation. Bacon's Abr. Rent, L; Cruise's Dig. tit. 28, c. 3. 'It is not enough, therefore,' the Chief Justice proceeded to say, 'that a third party has a paramount title; but to excuse the payment of rent the defendant must have been ousted or evicted under that title. Hunt *v.* Cope, 1 Cowp. 242; Pendleton *v.* Dyett, 4 Cowen, 581. But an eviction under a judgment of law is not necessary. An actual entry by one having a paramount title and present right of entry is an ouster of the tenant. He cannot lawfully hold against the title of such party. He is not bound to hold unlawfully and subject himself to an action, and is not, therefore, compellable to resist such entry. Hamilton *v.* Cutts, 4 Mass. 349. So when an execution creditor is put into possession by the sheriff under the levy of an execution, he has the actual and exclusive possession, and may maintain trespass. Gore *v.* Brazier, 3 Mass. 523. There is a recent case which seems to us alike [sic] in principle. Smith *v.* Shepard, 15 Pick. 147. A mortgagor in possession made a lease for years, reserving rent. Afterwards the mortgagee, having a paramount title, entered, as he lawfully might, with right to take the rents and profits. In a suit by lessor against lessee for rent such entry under a paramount title was held to be an ouster, and a good bar to the action.' But where the third person merely forbade the tenant to pay rent to his lessor, demanding it herself, but without avail, and had even brought a writ of entry which had not been tried, it was held that the tenant could not set up the title of such person in an action by the landlord to recover possession. Hawes *v.* Shaw, 100 Mass. 187. See also Hardy *v.* Akerly, 57 Barb. 148.

entry was equivalent to an actual ouster, and was a good and available defence to the action of rent. And this instruction was held right.[1]

The settled doctrine, in this country at least, is in accordance with the above-named case of Morse *v.* Goddard, that a constructive eviction is sufficient to remove the estoppel of the tenant.[2] A different rule, however, at one time prevailed in the courts of New York. It was even supposed in some of the cases that an eviction under legal process was necessary to produce this result;[3] and later, when this position was abandoned, it was still insisted that there must have been an actual entry and expulsion.[4] But this position is not now upheld.[5] Some doubt has been raised in a recent English case[6] whether constructive eviction is enough in England; but it has been distinctly declared enough in one case,[7] and evidently so considered in others.[8] And it has been said that the law must be regarded as settled in England in this way.[9]

The estoppel of the tenant may rest upon the sole ground that he has received possession from the landlord. It is perforce an admission of some title in him; and by reason of the landlord's change of position the act is deemed a binding

[1] Shaw, C. J. said that it was to be understood that when a tenant thus relied on an ouster in pais, without judgment, he had the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering. See Winstell *v.* Hehl, 6 Bush, 58.

[2] Grist *v.* Hodges, 3 Dev. 198; Ross *v.* Dysart, 33 Penn. St. 452; Simers *v.* Saltus, 3 Denio, 214; Greenvault *v.* Davis, 4 Hill, 643; Whalin *v.* White, 25 N. Y. 462, 465.

[3] Lansing *v.* Van Alstyne, 2 Wend. 563, note; Webb *v.* Alexander, 7 Wend. 281; Greenby *v.* Wilcocks, 2 Johns. 1.

[4] Waldron *v.* McCarty, 3 Johns. 471; Kortz *v.* Carpenter, 5 Johns. 120; Kerr *v.* Shaw, 13 Johns. 236.

[5] Simers *v.* Saltus, supra; St. John *v.* Palmer, 5 Hill, 599; Greenvault *v.* Davis, supra; Whalin *v.* White, supra. In California it is held that a tenant cannot justify an attornment to one who has recovered the land under an ejectment against the tenant if the landlord was not notified to come in and defend. Douglas *v.* Fulda, 45 Cal. 592.

[6] Delaney *v.* Fox, 2 C. B. N. S. 768, per Cockburn, C. J.

[7] Poole *v.* Whitt, 15 Mees. & W. 571, 577.

[8] Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307; Hawkes *v.* Orton, 5 Ad. & E. 367; Emery *v.* Barnett, 4 C. B. N. S. 423.

[9] 5 Am. Law Rev. 35.

admission that he had sufficient title to make a lease. Where, however, the tenant, being already in possession, has merely made an attornment or an acknowledgment of a tenancy, he may show that he did so through ignorance or mistake.[1] In the case Jew *v.* Wood a tenant filed an interpleader against two sets of persons who claimed to be respectively devisees and co-heirs of his original landlord; and the court granted an injunction to stay proceedings at law by one of the parties for the recovery of rent on payment into court of the sum due, though it appeared that the plaintiff had acknowledged in writing the title of the party suing at law, and had paid rent to him for nearly two years after the death of the original landlord, it appearing that this had been done in ignorance of the fact that the title was in dispute.[2]

[1] Wiggin *v.* Wiggin, 58 N. H. 285; Farris *v.* Houston, 74 Ala. 162; Jew *v.* Wood, Craig & P. 185; Doe d. Plevin *v.* Brown, 7 Ad. & E. 447; Cornish *v.* Searell, 8 Barn. & C. 471; s. c. 1 Man. & R. 703 Rogers *v.* Pitcher, 6 Taunt. 202; Gravenor *v.* Woodhouse, 1 Bing. 38.

[2] 'It appears to me well established,' observed Lord Chancellor Cottenham, 'by the uniform current of all the cases (for there is not that discrepancy between the cases which was suggested) that the rule of law is that after the death of the person to whom the occupier became tenant the tenant may require the person claiming under the original lessor to prove his title under such original lessor; and that although the tenant has paid rent to the person so claiming under the original lessor, he is not precluded from so doing by the payment of rent and other acts which might under other circumstances amount to an attornment. Several cases were cited. Rogers *v.* Pitcher, 6 Taunt. 202, was one. That was a case of mere mistake as to the title of the party to whom the rent was paid. There was no misrepresentation by the party so obtaining the rent; it was a mere misapprehension, and the payment of rent under such misapprehension was not considered as altering the situation of the tenant. He was permitted to call upon the person claiming his land to prove his title. Fenner *v.* Duplock, 2 Bing. 10, proceeded entirely upon the tenant's ignorance of the title of the party who claimed the rent. Gregory *v.* Doidge, 3 Bing. 474, is a still stronger case. There does not appear to have been any misapprehension; the tenant had deliberately acknowledged the party claiming as his landlord, and made an agreement with respect to the rent upon that footing. But this proving to have been done in ignorance of the title of the other party claiming was held not to bind the tenant. The case of Hopcraft *v.* Keys, 9 Bing. 613, has no direct application; that decision having proceeded upon this, that the occupier did not hold under the party who claimed the rent, that party having been evicted by a title paramount, and the occupier having commenced a new tenancy under the party who so evicted his prior landlord. The case of Doe d. Plevin *v.* Brown, 7 Ad. & E. 447, was a case of attornment made by the direction of the person under whom the tenant held. That title was disputed by his assignee; but Lord Denman, in holding that the

In like manner, where the title of the lessor who let the tenant into possession has expired, and the tenant has continued to acknowledge the tenancy, he may show that he has done so through mistake in regard to his landlord's title. In Feuner *v.* Duplock[1] replevin was brought for goods distrained for rent. The defendants avowed for a year's rent of a cottage and land held by the plaintiff as tenant to one of the defendants. It appeared that Duplock bought the premises of one Collins, who took them under a will. Duplock leased to the plaintiff, who paid rent until the death of Collins. At this time a third person claimed the premises, alleging that Collins had only a life estate under the will. He demanded rent of the plaintiff, who paid it and refused to pay longer to Duplock. Subsequently, however, upon distress he paid again to Duplock for some time, when the third person renewed his claim. The plaintiff acquiesced again, and again refused to pay to Duplock, who now levied the distress which caused the present replevin. The jury were induced to believe that Duplock knew that he had only an estate for the life of Collins, and that the plaintiff, though aware of the claim of the third party, had paid the rent to Duplock in ignorance of the precise nature of the claim and in ignorance that Duplock's estate expired at the death of Collins. A ver-

tenant was at liberty to dispute the title of the person to whom he had attorned, says that it was competent for him "to explain and render inconclusive acts done under mistake or through misrepresentation;" putting, therefore, mistake and misrepresentation for that purpose upon the same footing. So far, I think, it was admitted at the bar that the cases were uniform. But a case was referred to, Hall *v.* Butler, 10 Ad. & E. 204, which it is contended establishes a different doctrine. Now, I think the doctrine of that case is by no means inconsistent with the former cases, but completely and entirely consistent with them. In that case the tenant took possession and held under a person named Nevitt who afterwards directed the tenant to pay his rent in future to the defendant Butler. Another person then claimed by title paramount to Nevitt. Butler the defendant was entitled to stand in Nevitt's place; and the tenant, who could not dispute Nevitt's title, was held to be equally precluded from disputing Butler's. The judges put it upon this ground, either that the defendant Butler ratified the demise, or that there was a fresh demise by him; and in either case the tenant could not dispute Butler's title. Now, it will be observed that in either case the tenant was disputing the title of the person from whom he derived his tenancy, and not the title of a party claiming through such person. There is nothing, therefore, at all inconsistent in the doctrine of that case with the doctrine of all the preceding cases.'

[1] 2 Bing. 10; s. c. 9 Moore, 38.

dict was therefore found for the plaintiff; and it was now moved that it should be set aside on the ground that the payment of rent to Duplock by the plaintiff after he became aware of the adverse claim was an acknowledgment of Duplock as landlord, equivalent to a new taking. But the court held otherwise.[1]

The estoppel of the tenant applies, certainly in the absence of fraud or mistake, where he has taken a new lease, while still in possession from the same landlord. In such a case there arises what is called a surrender of the old lease by operation of law. The term 'surrender by operation of law,' according to Mr. Baron Parke, is applied where an owner of a particular estate has been party to an act the validity of which he has become estopped to dispute, — an act which would not be valid if his particular estate continued to exist. Among other examples he gives the one here mentioned, of a new lease. 'Thus,' he says, 'if the lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former.'[2]

The tenant or his assignee, it may then be broadly stated, is

[1] Best, C. J. referring to the general principle that the tenant may show that his landlord's title has expired, said: 'Yet if he enters on a new tenancy, he shall be bound; but before he can be so bound it must appear that he was acquainted with all the circumstances of the landlord's title. The landlord before he enters into any new contract must say openly, "My former title is at an end; will you, notwithstanding, go on?" The defendant in the present case knew that his title was at an end; was it honest in him to persist in his claim, and to call for rent under such circumstances? There is no ground whatever for saying that any attornment took place. Payment of rent may indeed be evidence of an attornment; but before we can decide whether an attornment has taken place we must look at the circumstances and see whether they do or not rebut the presumption of an attornment, and the circumstances of the present case repel any such presumption.'

[2] Reed *v.* Lyon, 13 Mees. & W. 285, 305. But quære whether accepting a new tenant, with consent of the former lessee, will work a surrender in law? Reed *v.* Lyon decides the question in the negative; so does Creagh *v.* Blood, 3 Jones & L. 133. Contra, Thomas *v.* Cook, 2 Barn. & Ald. 119; Walker *v.* Richardson, 2 Mees. & W. 882; Nickells *v.* Atherstone, 10 Q. B. 944. See Everest & Strode, Estoppel, 263 et seq.

not estopped to explain the circumstances under which. being already in possession, he has made an acknowledgment or an attornment to the plaintiff.[1] In Doe d. Plevin *v.* Brown,[2] to give a general illustration, an ejectment was brought against the assignees in bankruptcy of John Platt, who had demised to Joseph Platt. Subsequently to the demise John, becoming embarrassed, assigned the premises to the plaintiff. He then told Joseph of the assignment, and requested him to give the plaintiffs an acknowledgment; whereupon Joseph gave the plaintiffs a shilling, and agreed with them in writing to surrender possession to them. Soon after this a fiat in bankruptcy was issued, and John was declared a bankrupt, the defendants being appointed his assignees. The latter now disputed the validity of the transaction by which the premises were assigned to the plaintiffs. But it was insisted for the plaintiffs that as the defendants had come in to defend as landlords of Joseph, they were in no better condition than he; and that after the payment of the shilling and signing the memorandum by which he agreed to deliver possession to the plaintiffs, he was estopped from disputing their title. But the court ruled otherwise.[3]

[1] Attornment is not necessary, it seems, in Massachusetts upon a change of landlords. See Granger *v.* Parker, 137 Mass. 229.

[2] 7 Ad. & E. 447.

[3] Lord Denman, in delivering the judgment, said: 'No general rule, when rightly understood, is more important, or more strictly to be observed, than that which precludes the tenant from disputing the title of his landlord; and we may concede that in the present case the defendants stood in the same situation as Joseph Platt, and could avail themselves of no defence which was not open to him. But he had not received his possession first from the lessors of the plaintiff, nor was any attempt made to question that title under which he had received possession. Assuming that the one shilling was paid by way of acknowledgment . . . still, it was paid, in the first instance, upon the request and under the representations made by John Platt, and the memorandum signed only as a consequence of that payment, and upon the faith of the same representations. If at the very time when John Platt informed Joseph of the assignment of the lessors of the plaintiff he had committed an act of bankruptcy, and that assignment which he represented as valid was in truth void, he was practising a fraud on Joseph; and no case has decided that it would not be open to Joseph to explain under what circumstances he made any attornment or other acknowledgment. Gregory *v.* Doidge, 3 Bing. 474, is a strong and direct authority to the contrary. There was both the fact of one shilling paid as an acknowledgment of Doidge's title, and an agreement with him, after a statement of the amount of rent, to depasture some of his cattle in part payment of the rent. But this was done on the representation of Doidge's brother, and in ignorance of a defect

There has been some conflict upon the question whether the bare taking a lease of land of which the tenant was already in possession may estop him to deny his lessor's title. It is agreed in all the cases, as we have seen, that if the tenant was induced to take the lease by mistake, fraud, or misrepresentation on the part of the lessor, he may dispute his title.[1] So of a tenant in common who takes a lease from a wrongful claimant of the remaining interest, after the termination of the lease at all events.[2] On the other hand, a trespasser on lands who accepts a lease and agrees to give up possession when the term expires will be estopped to dispute the lessor's title until surrender.[3] The conflict arises in cases in which there is a simple question growing solely out of prior possession and later acceptance of a lease by the same person. In New York and Kentucky it is held that the estoppel prevails;[4] while in California the contrary doctrine has been held in two recent cases upon great consideration.[5] But even in that state it is held that the estoppel arises if the tenant does not prove a para-

in his title; and the Court of Common Pleas was clearly of opinion that, under these circumstances, the plaintiff, not having come into possession under Doidge, might show that he was not his landlord. Had even John Platt been the lessor of the plaintiff, it would have been open for Joseph to have shown a cesser of his title before the day of demise; for that would have been consistent with the accepting possession from him. Upon the broad principle, however, that it is always open to a party, not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation, we think this inquiry properly gone into.'

[1] Miller *v.* McBrier, 14 Serg. & R. 382; Swift *v.* Dean, 11 Vt. 323; Shultz *v.* Elliott, 11 Humph. 183; Franklin *v.* Merida, 35 Cal. 558, 571; Carter *v.* Marshall, 72 Ill. 609; Claridge *v.* Mackenzie, 4 Man. & G. 143; ante, p. 523.

[2] Fuller *v.* Sweet, 30 Mich. 237.

[3] Campau *v.* Lafferty, 43 Mich. 429, distinguishing Fuller *v.* Sweet, 30 Mich. 237.

[4] Jackson *v.* Ayres, 14 Johns. 224; Prevot *v.* Lawrence, 51 N. Y. 219; McConnell *v.* Bowdry, 4 T. B. Mon. 392; Patterson *v.* Hansel, 4 Bush, 654. See also Reed *v.* Lyon, 13 Mees. & W. 285, 305; ante, p. 525 (that by accepting a new lease the tenant will be estopped to deny a surrender of the old term); Caldwell *v.* Smith, 77 Ala. 157, 166; Lucas *v.* Brooks, 18 Wall. 436.

[5] Tewksbury *v.* Magraff, 33 Cal. 237; Franklin *v.* Merida, 35 Cal. 558. Sawyer, C. J. dissented in both cases. In delivering the opinion of the court in Franklin *v.* Merida Mr. Justice Sanderson said: 'The doctrine [of estoppel] is a harsh one, and is never to be applied except when to allow the truth to be told would consummate a wrong to the one party, or enable the other to secure an unfair advantage. If A being in possession of land deliver the possession to B upon his request and upon his promise to return it, with or without rent, at a specified time, or at the will

mount title either in himself or in some one under whom he claims.[1]

of A, B cannot be allowed while still retaining possession to dispute A's title, because to allow him to do so would be to allow him to work a wrong against A by depriving him of the advantage which his possession afforded him, and with which he would not have parted but for the promise of B that he would hold it for him, and in his place and stead. But the maxim, "Cessante ratione legis, cessat ipsa lex," must not be overlooked, — "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." If B is in possession and takes a lease from A, the latter parts with nothing, and the former has attained nothing by the transaction. If, however, either has gained anything, it is A. He has gained rent, and in the event of a controversy a prima facie case as against B without proof of title, while B's case is weakened by so much as a prima facie case is worth. A may have gained more, for he may have severed an adverse possession and stayed the running of the Statute of Limitations; for there can be no adverse possession while the lease subsists, or until there has been an open repudiation and disavowal of the tenancy by B. A's right to sue for possession is postponed, it is true. In that respect only is his relation to the property affected by the transaction, except beneficially; but for the possession which he might have obtained the rent promised by B is a legal equivalent. Having thus obtained no advantage over A by the transaction, why should B be estopped from showing precisely what he would have been permitted to show had the transaction never occurred? If A is thus in no worse plight than he was before the transaction, upon what principle in law or ethics can the truth be kept back? Upon what rational ground, either in an action upon the lease for rent or in an action for the possession, should B be denied the right to show that A had no title, and therefore no right to the rent or possession? If B has promised to pay rent, or hold the possession for it, he having no title, where is the consideration for B's promise? Suppose the title is in C; B is then legally bound to pay the value of the use and occupation to C, and surrender to C, notwithstanding the lease from A. If, then, he cannot be allowed to dispute A's title, B can be legally made to pay rent to A, and the value of the use and occupation to C. The doctrine of estoppel between landlord and tenant was never designed to work such a result. It was designed merely as a shield for the protection of the landlord, and not as a sword for the destruction of the tenant.' Further on the learned judge proceeds to say that the precise question is 'whether the bare possession of the tenant at the time the lease is given and taken is sufficient to take the case out of the operation of the general rule that the tenant cannot dispute the landlord's title, or whether there must be in addition to the possession of the tenant some force, fraud, misrepresentation, or mistake induced by the landlord, beyond what is implied in the transaction itself (*a*) by which the tenant was influenced to take the lease. The latter view is maintained by counsel, while in Tewksbury *v.* Magraff we declared the former. Counsel does not claim that force, fraud, misrepresentation, etc., are not, of themselves, irrespective of the fact of possession, sufficient to take the case out of the operation of the general rule. If they are, and of that there can

(*a*) That is, the giving and receiving a title not the landlord's.

[1] Holloway *v.* Galliac, 47 Cal. 474.

The doctrine of the California cases seems at first to derive support from a late English case in which it was held that where

be no doubt, it follows that on the score of principle the fact of possession is a false quantity for all the purposes of the question. If the bare possession of the tenant is not enough, and force, fraud, misrepresentation, and the like are of themselves enough to take the case out of the operation of the general rule, obviously the fact of possession is then wholly immaterial, and constitutes no quantity in the problem to be solved. So on the score of logic the argument, if it proves anything, proves too much. But it is said that Tewksbury *v.* Magraff goes further than any previous case has gone, and that it cannot be maintained upon authority. That there are cases where it has been held that the bare possession of the tenant at the letting does not relieve him from the estoppel cannot be denied; nor can it be denied, as we shall presently see, that there are cases the other way. The latter, in our judgment, accord with the reason upon which, as we have seen, the estoppel is founded, but the former do not. Of the cases which declare a doctrine contrary to the one entertained by us there are two classes: first, those in which the facts presented the dry question whether the bare possession of the tenant at the letting relieves him from the estoppel; and second, those in which the dry question was not presented by the facts, and the doctrine was announced merely in the course of discussion. The latter are entitled to no consideration as precedents. For the former only can that distinction be claimed. Of them only two have been called to our attention in which the decision turned upon a bare possession by the tenant at the time of the letting, — McConnell *v.* Bowdry's Heirs and Widow, 4 T. B. Mon. 392, and Jackson *v.* Ayres, 14 Johns. 224. In neither case was the reason upon which the estoppel is founded considered or applied. In each the court merely stated what it considered to be the rule; and the latter case, as the report shows, was submitted without argument. Such cases are far from satisfactory, and are not to be received as conclusive of the law. The remaining cases upon which the respondent relies are entirely consistent with the rule announced by us in Tewksbury *v.* Magraff. In Hall *v.* Butler, 10 Ad. & E. 204, N, having no title to certain premises, let them by parol and received rent. Afterwards another claimant, B, demanded the rent; and N, being satisfied with B's title, informed his tenant in B's presence that he had given up the premises to B, who was now the landlord, and that the rent was thenceforth to be paid to B. The tenant acquiesced, and when B demanded the next quarter's rent, paid part of it on account. Lord Chief Justice Denman, Mr. Justice Littledale, and Mr. Justice Patterson, all delivered opinions to the effect that the tenant was estopped, but put their conclusions upon somewhat different grounds. Lord Denman put his judgment upon two grounds: first, that N was to be considered as the agent of B, and therefore that the entry of the tenant was under B's title; and second, that there was a fresh demise by B, unaccompanied by any misrepresentation as to the title of B. In this latter ground Lord Denman implied merely that the possession of the tenant of itself made no difference in the result. Mr. Justice Patterson, however, recognized the contrary doctrine. He said: "There is a distinction between disputing the title of one who has actually let the party into possession, and of one who afterwards claims to be entitled. In the latter case the tenant may generally dispute it by showing title in another." He then adds: "I am not sure that it [the transaction between N and the tenant] may not be as an original taking from B himself; for N treats himself

a person in possession of land under a good title became tenant by attornment to another, under an arrangement for an assign-

as the agent of B, who adopts the demise." This common ground must be considered as the ground upon which the judgment in the case rests, in which view the case is entirely consistent with the rule in this court. Ingraham *v.* Baldwin, 9 N. Y. 45, was a case where the tenant entered under the lease, and the landlord afterward conveyed to the plaintiff, to whom the tenant then attorned, and it was held that the tenant could not dispute the title of the plaintiff. Instead of being at war with Tewksbury *v.* Magraff, this case is entirely consistent with it. We there held that in such a case the tenant could dispute only the derivative title. By so doing he does not deny the title of his landlord, but merely that the plaintiff has become the grantee of his landlord. But beyond that he cannot go; for to do so would be to dispute the title under which he entered. The other cases are where extrinsic misrepresentation and the like on the part of the landlord accompanied the possession of the tenant at the letting, when it was held that the tenant was not estopped. Hall *v.* Benner, 1 Penn. 402; Hamilton *v.* Marsden, 6 Binn. 45; Brown *v.* Dysinger, 1 Rawle, 408; Miller *v.* McBrier, 14 Serg. & R. 382; Swift *v.* Dean, 11 Vt. 323; Shultz *v.* Elliott, 11 Humph. 183. Of them it is sufficient to say that they are not authority upon the question in hand. They establish the proposition that a tenant who was in possession at the time he took his lease, and who was induced to take it by unfair means, may dispute his landlord's title, — a proposition which no one disputes. Because they do that, however, they cannot be taken as negatively establishing the proposition that the tenant cannot dispute the title of his landlord solely upon the ground that he was in possession when he took the lease. . . . We now come to those cases by which, as we consider, the rule in Tewksbury *v.* Magraff is sustained. Chettle *v.* Pound, 1 Ld. Raym. 746, was action of debt for rent. Upon nil debet pleaded the plaintiff gave in evidence a note in writing by which the defendant had agreed to hold for one year, rendering rent of fifteen pounds sterling. The plaintiff was grantee of a reversion expectant upon an estate for life, and the tenant for life was dead at the time the note was given. The grant to the plaintiff was made forty years before, and he had never been in possession. The defendant offered to prove a grant of the reversion prior to that of the plaintiff, and thus show that the plaintiff had no title at the time the note in writing was given; and it was ruled by Mr. Chief Justice Holt that the defendant could do so because the plaintiff had never been in possession; but if he had, that then the defendant could not have given the prior grant in evidence without having been evicted. There was no pretence that the note in writing by which the defendant had agreed to hold for the plaintiff had been obtained by any unfair means not implied in the transaction itself, and the case turned wholly upon the bare fact that the defendant did not receive the possession from the plaintiff. Rogers *v.* Pitcher, 6 Taunt. 202, was replevin for property distrained for rent. The plaintiff was in possession, and the defendant obtained a judgment and elegit against a moiety of the premises, and thereafter the plaintiff had paid rent for such moiety. The defendant on whom the issue of tenancy lay proved the payment of rent and rested. The plaintiff proposed to answer it by showing that the defendant was not at the time the rent was paid or then legally entitled to the rent; to which the defendant objected upon the ground that by the payment of the rent the plaintiff had acknowledged the defendant as her land-

ment (which had never been perfected) between the original lessor and the party to whom the attornment was made, he

lord, and was now estopped from contesting his title. It was held that the plaintiff was not estopped. There was no pretence of any extrinsic misrepresentation, or the like, on the part of the defendant, by which the plaintiff had been induced to pay rent. There was, therefore, no ground for the rule adopted except the possession of the plaintiff before and at the time of the attornment; although there is, as we admit, language in the opinions of the judges which unless read by the light of the facts of the case might lead to the inference that the case included express misrepresentation or the like. But it is well understood that on the score of authority it is the facts and the judgment thereon which constitute the case, and not the mere language of the court in announcing its conclusions. Gravenor *v.* Woodhouse, 1 Bing. 38, was also an action of replevin for property distrained for rent. At the trial the defendant put in a written attornment by which the plaintiff, being in possession at the time as the attornment upon its face showed, agreed to hold for one year, and from year to year, at a yearly rent of seventy pounds sterling, without prejudice to any right or claim of his own to the premises. It was objected on the part of the plaintiff that the language of the avowries was not sustained by the attornment, and evidence was offered of a feoffment made to the plaintiff by a person under whom the defendants claimed, and of certain letters from that person containing expressions which were said to be adverse to the defendants. The court, however, thought the avowries sustained by the language of the attornment, and rejected the evidence upon the ground that the plaintiff could not dispute his tenancy after having made the attornment in question. There was no pretence, so far as the case shows, that the attornment had been obtained by any unfair means not implied in the transaction, on the part of the defendants. The judgment went against the plaintiff, and there was, therefore, no ground for a new trial except the fact that the plaintiff was in possession when he attorned. A new trial was nevertheless granted; the court holding that the attornment did not estop the plaintiff. Cornish *v.* Searell, 8 Barn. & C. 471, was assumpsit for use and occupation. A, being tenant under B and a sequestration having issued out of chancery against B, signed the following instrument: "I hereby attorn and become the tenant of C and D, two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon." It was held, first, that this was an agreement to become tenant, and required a stamp; and second, that A, not having received possession from C and D, might dispute their title. So far as the statement of facts as given by the reporter shows, there was in this case no suggestion of unfair means not intrinsic, on the part of C and D, by reason of which A was induced to attorn to them. Yet it has been said that it was a case of mistake. This statement has no foundation whatever in the facts of the case, and rests entirely upon a single word found in the opinion of Mr. Justice Bayley, who said: "As sequestrators they [the plaintiffs, C and D] have no legal right to receive the rents. It has been said that the defendant having agreed to become tenant to the plaintiffs cannot dispute their title. If the defendant had received possession from them he could not dispute their title. In Rogers *v.* Pitcher and Gravenor *v.* Woodhouse the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely

would not be required after the termination of the lease to give up the possession before he could dispute the lessor's title.[1] Without expressing any opinion how the case might have been during the continuation of the lease, Chief Justice Erle said that he could find no authority for the doctrine that a person taking a lease of his own land was not entitled at the expiration of the term to dispute the title of his lessor.[2] But it would seem to

attorned by *mistake* to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title; in the latter he may." The claim that the case was one of mistake is founded solely upon the use of the word "mistake" in the foregoing passage. There was no mistake whatever as to the title of C and D. There could be none; for the instrument which was signed by A showed upon its face that they were only sequestrators, and therefore without legal claim to the rents. It cannot be supposed that a person in possession will knowingly take a lease from a party who has no title to the premises, and it is not, therefore, a forced use of language to speak of it as a "mistake;" and it is in that sense that we understand Mr. Justice Bayley. But were it otherwise the incautious use of words by the court cannot override the facts of the case, or limit the force of the judgment. It is very plain that A signed the instrument with his eyes open, knowing all the facts and circumstances, and that it was considered that he was estopped by that act. In Jackson *v.* Cuerden, 2 Johns. Cas. 353, the defendant A, being in possession under B, the supposed proprietor, applied by letter to C as the real owner to purchase, and requested to be considered as a tenant. In ejectment by C against A it was held that the latter was not estopped by his letter from showing that his letter was grounded on a mistake, *or that the fee existed in himself or out of the plaintiff.* See also Jackson *v.* Spear, 7 Wend. 401. In all cases where a party out of possession seeks a taking and holding under himself by another in possession, from the very nature of the case there must be a representation by him that he is the owner. The bare proposition to lease involves such a representation; and if he be not the owner, the representation is false. If under such circumstances a party in possession takes a lease, his act can be accounted for upon no rational theory except that he was influenced by this express or implied representation. When, therefore, in the opinions of the judges such expressions are used, their sense is fully satisfied, as we consider, by the intrinsic probability that there was unfair means employed, or there was some mistake by which the tenant was induced to act; and in our judgment such intrinsic probability not only justifies but requires the courts to look behind the lease, and unearth the truth. As already suggested, the doctrine of estoppel was not designed to secure to any one an advantage over another, but to prevent such a result, and to maintain the status which existed at the outset; to protect the landlord in his actual possession against the trickery or sharp practice of the tenant, not to enable him to impose upon the tenant and thereby to obtain that which before he had not.'

[1] Accidental Death Ins. Co. *v.* Mackenzie, 10 C. B. N. S. 870, Am. ed.; S. C. 5 Law T. N. S. 20.

[2] See Doe d. Jackson *v.* Wilkinson, 3 Barn. & C. 413; ante, p. 511. See also Shelton *v.* Carrol, 16 Ala. 148; Agar *v.* Young, Car. & M. 78.

be a sufficient ground to sustain the case that the assignment was not perfected.

In a similar case recently before the Supreme Court of Massachusetts [1] the tenant, who had attorned to the heirs of his lessors, was held estopped to set up the title of a third person, though it appeared that he was ignorant of her title when he made the attornment, and though she had forbidden him to pay rent to the plaintiffs, demanding that it should be paid to herself. It did not appear, however, that he had ever attorned to her, or that he had been evicted, or that he had renounced his tenancy under the plaintiffs. So too in another recent case [2] in the same state a defendant in a suit for possession was not allowed to prove that he had been in possession in right of his wife prior to taking a lease from the plaintiff, and that before the end of the term he had given notice to the plaintiff that he should renounce his title and claim thenceforth under that of his wife. Nothing was said of fraud or mistake. And a similar ruling in effect was made in Hogan *v.* Harley.[3]

The prior case of Cobb *v.* Arnold [4] is still stronger. This was an action for use and occupation; and the defendant, who had taken a lease from the plaintiff, offered to prove that for thirteen years before the lease was taken, and down to the time of the trial, twelve years later, he had been in quiet, exclusive, and adverse possession of the land, using and treating it as his own all the time. But the evidence was excluded.

The question under consideration has nothing to do with the case of an attornment to one claiming under the original lessor. Nothing is more certain than that an attornment to such a person leaves the tenant ordinarily in precisely the same position (so far as the question of the estoppel to deny the title of the lessor is concerned) as he was with the original landlord; he cannot dispute the title in the one case more than in the other,[5]

[1] Hawes *v.* Shaw, 100 Mass. 187. See Trafton *v.* Hawes, 102 Mass. 533.

[2] Miller *v.* Lang, 99 Mass. 13.

[3] 8 Allen, 525.

[4] 8 Met. 398. Some of the exceptions to the rule are stated in this case; all of them, however, are covered by the statements in our text, — entry under a stranger, expiry of title, and constructive eviction by judgment. See also First Parish *v.* Dow, 3 Allen, 369.

[5] Otis *v.* McMillan, 70 Ala. 46, 53; Dobson *v.* Culpepper, 23 Gratt. 352. The nature of the alienation of the reversion is not material. Otis *v.* McMillan, supra.

except by showing that the *derivative* title is defective, or that the attornment was made under the influence of fraud or mistake, or the like.[1]

The only room for the question raised in California is either in the case of an original lease, or when the attornment is made to a stranger to the title of the lessor. In such a case is bare possession in the tenant, without mistake, fraud, or the like, in the leasing or attornment sufficient to remove the estoppel? The landlord may still have changed his position, reasonably induced by the lessee's acceptance of a tenancy. There would then be the elements of an estoppel in pais; and without stopping longer than to refer to the fact that the doctrine that the act of the party against whom the estoppel is claimed must have been *wilful* in a literal sense, if it ever prevailed, has been overruled,[2] it is enough to say that the case might present features quite as conclusive as those in the case of the estoppel of a tenant who has received possession from his landlord; for taking possession from a landlord is only one way in which a change of position may take place. It is immaterial what may be the nature or extent of the change, provided there has been a substantial change in fact, so that the landlord would be placed in a less advantageous position by allowing the denial of his title than he would have occupied had not the tenancy been created.

A very important qualification of the rule of the tenant's estoppel prevails in the case of an actual disclaimer. If the tenant disclaim to hold of his lessor, and notice of the fact is brought home to the lessor, the tenant's possession then becomes adverse; the lessor may at once eject him from the premises; and if he fails to do so before the period of limitation has expired, the tenant may then set up his own title acquired by adverse possession, or the title of any other person under whom he claims to hold. But he cannot set up such title in an action brought by the lessor before the expiration of the period of limitation.[3]

[1] Carter *v.* Marshall, 72 Ill. 609.

[2] Cornish *v.* Abington, 4 Hurl. & N. 549.

[3] See Willison *v.* Watkins, 3 Peters, 43; Peyton *v.* Stith, 5 Peters, 485, 491; Walden *v.* Bodley, 14 Peters, 156, 162; Zeller *v.* Eckert, 4 How. 289; Doe d. Clun *v.* Clarke, Peake, Add. Cas. 239; Wells *v.* Sheerer, 79 Ala. 142; Taylor, Land. & T. § 522, and cases cited.

The subject is exhaustively reviewed in the case first cited, and stated to apply as well to the relations of mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where a person obtains possession of real estate belonging to another in subordination to his title. In this case Willison had been a tenant of one Bordeaux under whom the plaintiff claimed, and afterwards Bordeaux was apprised that Willison claimed the premises by adverse title. It appeared that Willison had been in possession a sufficient length of time since the fact of his disclaimer came to the knowledge of Bordeaux to acquire a title under the Statute of Limitations, provided it should be held that he was entitled to the benefits of the statute. The action was trespass to try title; and the plaintiff contended that Willison was precluded from setting up title in himself, without first surrendering possession. But the court held otherwise. It was an undoubted principle of law, the court observed, that a tenant could not dispute his landlord's title either by setting up title in himself or in a third person during the existence of the tenancy. He could not change the character of the tenure by his own act merely, so as to enable him to hold against his landlord (who reposed under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination) by the lapse of time, or by demand of possession. But the court did not think that the doctrine in this or in any of the analogous relations had been adopted to the extent contended for in the present case, which presented a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession beyond the period of limitation. By the known disclaimer of Willison the tenancy had been terminated, and Bordeaux had the right to treat him as a wrongdoer holding adversely; and having the right to do so, he was bound to exercise his power. It would be an anomalous possession which in relation to one party was adverse and in relation to the other fiduciary, if after a disclaimer known to the landlord the tenant forfeited his possession and all the benefits of the lease. No injury could be done the landlord unless by his own laches. If he sued within the period of limitation, he would prevail; and if he suffered the time to pass by without

suit, it was but the common case of a party losing his rights by his own negligence.[1]

The cases show that a tenant may prove that one to whom he has paid rent by attornment has no *derivative* title from his original lessor. Doe d. Higginbotham *v.* Barton[2] was such a case. It was an ejectment for certain lands in Cheshire. On the trial the plaintiff proved that one Morton, being seised in fee of the premises in controversy, demised a part to the defendant Barton as tenant from year to year. Subsequently he assigned all the premises by way of mortgage to Higginbotham the plaintiff; whereupon Barton on demand made by the plaintiff paid the rent to him for several years. In the mean time the plaintiff demised the part not leased to Barton to one Bullock, who having paid rent for a year and upwards then underlet to Warburton the other defendant. Subsequently both Barton and Bullock refused to pay rent to the plaintiff, who then served notices to quit. The defence was that Morton had mortgaged the same premises to one Marriott in fee prior to the mortgage to the plaintiff, but that he (Morton) had remained in possession; that Marriott had conveyed the premises in fee to one Woodhead, and that Woodhead had given notice to the defendants to pay the rent to him, which they obeyed, refusing to pay longer to

[1] The court having shown that the leading authorities (Hovenden *v.* Annesley, 2 Schoale & L. 607; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 122; Hughes *v.* Edwards, 9 Wheat. 490, 497; and other cases, relating to trusts and mortgages) supported the rule which it had adopted, then said: 'All these principles bear directly on the case now before us; they are well-settled and unquestioned rules in courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorning to a title adverse to his landlord the tenant commits a fraud as much as by the breach of any other trust. Why, then, should not the statute protect him, as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the Statute of Limitations is a bar to the plaintiff's action.'

[2] 11 Ad. & E. 307.

the plaintiff. The question raised was whether the defendants were estopped to make this defence. The court held that they were not.[1]

This doctrine that a tenant is not estopped to deny the validity of a derivative title is also illustrated by the recent case of Hilbourn *v.* Fogg.[2] This was an action of tort for ejecting the plaintiff from a room in a house in Charlestown. It appeared that McGrath, one of the defendants, was tenant at will of the house, and that the plaintiff was tenant at will under her. Subsequently McGrath made a written lease to Fogg, who with the assistance of McGrath and other defendants, after due notice to quit, entered the plaintiff's room and removed her effects. It was contended on the part of the defendants that the plaintiff was estopped to maintain the action; but the court ruled otherwise.[3]

[1] Lord Denman, who delivered the judgment in this important case, said: 'Supposing the facts to be as above stated, it is clear that the lessor of the plaintiff never had any legal estate, and he must rely on the rule with regard to landlord and tenant. That rule is fully established, viz. that the tenant cannot deny that the person by whom he was let into possession had title at that time, but he may show that such title is determined. Doe d. Knight *v.* Smythe, 4 Maule & S. 347. With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by payment of such rent if he can show that it was paid under a mistake. These defendants, therefore, stand in different situations. Warburton is precluded from denying that the lessor of the plaintiff ever had a title, and must show that such title as he had is determined. Barton is precluded from denying that Morton had a title, but he is at liberty to deny that the lessor of the plaintiff ever had any derivative title from Morton unless the payment of rent concludes him. We do not think that he is so concluded because he, being tenant to Morton and having notice of a subsequent mortgage by Morton to the lessor of the plaintiff, had no right to question it; nor until he received notice from Woodhead of the prior mortgage had he any reason to doubt that the legal estate had passed to the lessor of the plaintiff. He may truly be said to have paid the rent under a mistake; and then he may show, not that Morton had not a title by which he (Barton) would be estopped as against Morton himself, but that Morton's title was not such a one as would enable him to pass a legal estate to the lessor of the plaintiff. If the evidence had been received, he would have shown that Morton had only the equity of redemption, and that nothing more passed to the lessor of the plaintiff from Morton. And this, we think, he was at liberty to show, though if there had been a demise in the declaration by Morton himself it might have been otherwise.'

[2] 99 Mass. 11.

[3] The court by Mr. Justice Gray observed that the well-settled rule of law by which a tenant entering under an oral lease is estopped so long as he continues in possession thereunder to deny the lessor's title at the time of

The tort in this case, it will be noticed, was committed by Fogg, and McGrath and the other defendants evidently stood in the relation of agents to him. Had McGrath expelled the plaintiff after properly putting an end to the lease, it is plain that the action could not have been maintained; for the plaintiff would not have been permitted to question the lessor's title. The ruling in the case was simply to the effect that the plaintiff was not estopped to say that no title had passed by the subsequent lease to Fogg.

When the relation of landlord and tenant is established, the rule of estoppel upon the tenant prevails though the tenancy be

making the lease, as against the lessor, his heirs and assigns, is founded on the injustice of allowing one who has obtained possession by admitting the title of another to deny the title, and in case of failure in proof of it hold the premises. 'The rule holds good,' said the court, 'where the actual title of the lessor is that of a mere tenant at will, and applies in every form of action by which the lessor may seek to assert the rights reserved or promised to him in his lease. Coburn *v.* Palmer, 8 Cush. 124; Towne *v.* Butterfield, 97 Mass. 105. But it is equally well settled that the tenant is not estopped to deny that since his own entry into possession his lessor's title has expired, either by its own limitation, or by the act of the lessor, or by eviction by title paramount; and that when the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title. England *v.* Slade, 4 T. R. 682; Doe d. Marriott *v.* Edwards, 5 Barn. & Ad. 1065; Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307; s. c. 3 Per. & D. 194; Mountnoy *v.* Collier, 1 El. & B. 630; London & Northwestern Railw. Co. *v.* West, L. R. 2 C. P. 553; Despard *v.* Walbridge, 15 N. Y. 374. In Doe [d. Higginbotham] *v.* Barton [supra] Lord Denman said that if the lessor had been strictly tenant at will of another, no doubt his tenant might have shown the determination of that will on the part of the lessor's lessor. In this case the plaintiff occupied her room as tenant at will of McGrath, and while this tenancy at will continued might maintain an action against McGrath or any person claiming under her for disturbing the plaintiff's possession. Dickinson *v.* Goodspeed, 8 Cush. 119. McGrath made a written lease of the room to Fogg, which if the lessor had had a sufficient title would have terminated the tenancy at will of the plaintiff, and prevented her from maintaining this action for the removal of her goods. Curtis *v.* Galvin, 1 Allen, 215; Pratt *v.* Farrer, 10 Allen, 519. But the report finds that McGrath did not own the estate, and was herself a mere tenant at will of the rightful owner, and could not therefore make a valid alienation by written lease which would give Fogg a better title than she had previously granted to the plaintiff. Cooper *v.* Adams, 6 Cush. 87, 90. This fact is in no way inconsistent with her title as lessor at will of the plaintiff; and the plaintiff by having entered into possession as her tenant at will was not estopped to deny that she had any greater estate, and to maintain this action.' To the same effect Palmer *v.* Bowker, 106 Mass. 317.

created by a deed which shows that the landlord possessed no legal estate,[1] unless possibly the nature of the action requires a legal estate to support it, as in the case of ejectment or covenant.[2] This doctrine is an important qualification to the rule that there is no estoppel where the truth appears.[3]

[1] Tilyou *v.* Reynolds, 108 N. Y. 558, 563; Jolly *v.* Arbuthnot, 4 De G. & J. 224; Dancer *v.* Hastings, 12 Moore, 34; s. c. 4 Bing. 2; Morton *v.* Woods, L. R. 4 Q. B. 293; Cornish *v.* Searell, 8 Barn. & C. 471.

[2] See ante, pp. 362, 363.

[3] In Jolly *v.* Arbuthnot, supra, the question was whether the relation of landlord and tenant had been created by a receivership deed between the receiver and another party, a bankrupt, so as to give the receiver the right to distrain for rent; the deed showing an attornment by the bankrupt to the receiver, and at the same time showing that the legal title was not in the latter. 'It is contended,' said Lord Chancellor Chelmsford, 'that the attornment to Aplin [the receiver] had no operation; not by agreement, because he had no interest in the land to which it could apply; nor by estoppel, because the deed sets forth the rights and interests of all parties, and shows that Aplin had no reversion in the premises to which the power of distress could be incident. It appears to me, however, that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done.' In the still more recent case of Morton *v.* Woods, above cited, in which the same point arose, Kelly, C. B. in delivering judgment, remarked concerning the objection that the defendants not having the legal estate could have no right of distress: 'That they had not in fact the legal estate is clear; but that may be said of all lessors where there is a lease and a tenancy by estoppel, and where the lessors have frequently no title at all. Here the defendants have an equitable title only, and the question becomes of primary importance because it is only by estoppel that the defendants can be said to have the legal estate, and it is said that no estoppel arises where the truth appears upon the face of the instrument which is the evidence of the agreement between the parties; and it may be taken, as appears on the mortgage deed, that the defendants were not seised of the legal estate, but that it was in the first mortgagee, Mr. Horn. A number of cases bearing on this point have been cited; but when we come to look at the facts and the ratio decidendi of each, none of them are directly in point. They were either actions of covenant, in which the covenant must be enforceable as an obligation at law, or actions of ejectment on a clause of re-entry, where it is perfectly clear there must be the legal estate in the plaintiff, and that if it is outstanding he cannot succeed. [The cases referred to are Pargeter *v.* Harris, 7 Q. B. 708; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; s. c. in error, 6 Hurl. & N. 135; Saunders *v.* Merryweather, 3 Hurl. & C. 902. See ante, pp. 362, 363.] But even if any of the decisions or dicta were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of Jolly *v.* Arbuthnot, 4 De G. & J. 224. . . . There is undoubtedly this difference between Jolly *v.* Arbuthnot and the present case, that the mortgagee was a party to the deed in that case, whereas the original mortgagee is not a party

The only case directly holding that where the deed shows that the lessor had not a legal reversion, the lessee may dispute the title in an action upon the covenants, is Pargeter *v.* Harris;[1] though the doctrine is referred to with approval in a dictum by Mr. Baron Martin in the subsequent case of Cuthbertson *v.* Irving.[2] The distinction must be a fine one which will allow the tenant in a lease showing the facts to dispute the title in covenant, and refuse him the power in a contest concerning the validity of a distress. The doctrine of the cases of Jolly *v.* Arbuthnot and Morton *v.* Woods, above cited, seems sound, and they leave a very narrow ground for Pargeter *v.* Harris and the like cases to stand upon.

The question arose again in a late case in the Exchequer.[3] In this case the plaintiff had granted a lease to the defendant which recited that it was subject to a prior lease to other persons. The action was ejectment, and it was admitted that the covenant to repair had been broken and that rent had been paid to the plaintiff under his lease. It was objected by the defendant that the plaintiff could not recover because it appeared from the face of the lease that there was an outstanding title. But the objection was overruled.[4]

A similar point arose in the Pennsylvania case of Holt *v.*

to the agreement in this; but it is the creation of the tenancy, or the estoppel which arises from the creation of the relation of landlord and tenant by agreement between the parties, that makes the actual legal estate unnecessary to support the distress, and not the consent of the third party in whom the legal estate is. Therefore the two cases are essentially identical, and if we had any doubt on the subject, which we have not, we should be bound by that authority; and we therefore hold that the right of distress, so far as this point of the want of the legal estate is concerned, is unaffected by the fact that such want of the estate appeared on the agreement by which the relation of landlord and tenant was created between the parties.'

[1] 7 Q. B. 708.

[2] 4 Hurl. & N. 742.

[3] Duke *v.* Ashby, 7 Hurl. & N. 600.

[4] 'The question,' said the Chief Baron in the course of the argument, 'is whether, when a person accepts a lease admitting upon the face of it some infirmity of title in the lessor, the doctrine applies that there is no estoppel where all the facts appear. I do not think that that technical doctrine of estoppel applies to the case of landlord and tenant. Suppose a mortgagor in possession grants a lease; could the lessee dispute his title because the legal estate is in the mortgagee?' See Cuthbertson *v.* Irving, 4 Hurl. & N. 742; s. c. in error, 6 Hurl. & N. 135. But he said the case would have been different had the defendant obtained an assignment of the prior lease.

Martin.[1] This was an ejectment by Martin, in which it appeared that he, being owner of an undivided seventh part of a house, leased the whole in his own name as agent. Having conveyed away his interest, he brought the present action. The defendant Holt attempted to show that the owners of the other interests had revoked Martin's agency, but the court held the evidence inadmissible.[2]

The doctrine that the tenant cannot dispute his landlord's title is not confined to the action of ejectment; that was expressly decided in Delaney *v.* Fox.[3] This case was an action of trespass upon certain premises. The defendant pleaded liberum tenementum, and a special plea showing a tenancy of the plaintiff under him, and its determination by notice. The plaintiff gave evidence that at the time she was let into possession by the defendant he had no title, but that the title was in a third person to whom the plaintiff under a threat of distress paid rent. It was objected that she was estopped from disputing the defendant's title; but counsel on the other side contended that the rule of estoppel was confined to the action of ejectment, and did not apply to trespass.[4] The court decided in favor of the de-

[1] 51 Penn. St. 499.

[2] 'At first sight,' said Agnew, J. for the court, 'this might seem competent, but a close inspection discloses a direct conflict with the rule that a tenant shall not dispute the title of his landlord as it was when he took the lease. It was Martin who let the premises to Holt. The relation of landlord and tenant, by the terms of the lease, was exclusively between them. The covenants were those of Martin and Holt alone, and the sealing and delivering also. Upon any breach of the lessor's covenants the action would lie against Martin and no other. Martin simply described himself as "agent," no more, no less, and it is thought this opened the door to the proof. But agent for whom, or for what? We are not informed. Was he a mere agent without an estate; or, himself holding the legal title, was he an agent for purposes connected with the title he held? None of these appear by the lease. And if agent for others, were they the same persons indicated in the offer? If not, clearly Martin could rebut the proof offered. His calling himself agent was no admission of title in the persons named in the offer. Thus, it was a direct attempt to deny the title of Martin; for, if competent, it showed title in third persons, and brought on directly a conflict upon the title of Martin, and not upon the mere termination of the lease.'

[3] 2 C. B. N. S. 768. So in Ward *v.* Ryan. 10 Ir. R. C. L. 17.

[4] Referring to the language of Pollock, C. B. in Watson *v.* Lane, 11 Ex. 769, citing Heath, J. in Ogle *v.* Atkinson, 5 Taunt. 759.

fendant. Chief Justice Cockburn said that upon principle there was no distinction between the case of ejectment and the present case. There could be no substantial difference between the landlord's asserting his title by bringing ejectment at the immediate expiration of the term, and his asserting it in defence of an action of trespass at a future period. On the other hand, there had not even been a constructive eviction in the case; and even if there had been, he doubted whether such an eviction could be considered as a determination of the landlord's title.[1]

The rule of the tenant's estoppel prevails against one who is in possession of land under a mere license.[2] On the other hand, it is said that if a person take possession of land under a mortgagee, not as his tenant but as devisee of the mortgagor, to keep possession, keep the fences in repair, pay the taxes, and enjoy the rents and profits, without paying rent, and not recognizing an absolute title in the mortgagee, he will not be estopped to dispute the mortgagee's title.[3]

Whether the estoppel prevails where the tenancy is created by act of the law is not quite clear.[4] It has been held that a widow by continuing in possession of her husband's land will be estopped against the heir to deny his title on the ground that she thus becomes tenant to the heir;[5] also that she would be estopped against the husband's grantee.[6] So too it is held that a tenant by the curtesy cannot allege that the title of his wife was defective against one who claims under the wife.[7] The case cited was an action of waste alleged to have been committed by the defendant occupying as tenant for life. The plaintiff claimed title under a deed from the defendant's wife. It appeared that

[1] That constructive eviction is sufficient to remove the estoppel in America, and probably also in England, see ante, pp. 521, 522.

[2] Glynn v. George, 20 N. H. 114; Doe d. Johnson v. Baytup, 3 Ad. & E. 188, Coleridge, J.; Wilson v. Maltby, 59 N. Y. 126; Hamilton Hydr. Co. v. Cincinnati R. Co., 29 Ohio St. 341; Dills v. Hampton, 92 N. Car. 565.

[3] Sahler v. Signer, 37 Barb. 329.

[4] See Tully v. Tully, 71 Cal. 338, trustee.

[5] Den d. Bufferlow v. Newsom, 1 Dev. 208; Den d. Williams v. Bennett, 4 Ired. 122; Den d. Grandy v. Bailey, 13 Ired. 221.

[6] Ibid.

[7] Morgan v. Larned, 10 Met. 50.

the latter's title had been derived from a location which was irregular and defective. The defendant for this reason objected that the location had given no title to his wife; but the court overruled the objection. Mr. Justice Hubbard said that the title of the plaintiff was voidable, but the defendant was not in a position to take advantage of any defect in it, since he had entered under his wife's right, and held as tenant by the curtesy, subject to the rights of the children. He was estopped to deny the title under which he entered by alleging that he was now a disseisor. However, in Vance *v.* Johnson [1] it appeared that Vance had conveyed the real estate in question in trust to one Bailey, but that Vance had remained in possession until his death, and that his widow continued in possession thereafter. After the conveyance in trust the land was sold under execution to one Washington, from whom the widow of Vance took a lease; and the question was whether in her relation to Bailey she had the legal right to take the lease from Washington. The court decided in the affirmative, deeming the widow entitled to disclaim any holding under Bailey.[2]

[1] 10 Humph. 214.

[2] 'This rule [of tenant's estoppel] cannot be held applicable,' said McKinney, J. in delivering judgment, 'to the same extent to a case where no such actual relation exists; where the person in possession did not receive such possession from the legal owner; where there exists between them no privity either of estate or contract; where there is no obligation on the part of the person in possession to pay rent or other service, or pledge of faith to restore possession; in short, where there exist no reciprocal duties or obligations binding equally upon the parties, or either of them. The relation of mortgagor (suffered to remain in possession until foreclosure) to the mortgagee is in some respects like that of a tenancy at will, but it is not strictly such. And the relation of the conveyor in a deed of trust to the trustee is exactly similar. In the case of Moss *v.* Sallimore, 1 Doug. 279, 282, Lord Mansfield says, "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only quodammodo. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will." The same doctrine is held by Buller, J. in the case of Birch *v.* Wright, 1 T. R. 378, 383. 'All the authorities, however, concur that the possession of the mortgagor is not to be regarded as adverse to the mortgagee; and so as regards the parties to a deed of trust, which stands on the same principle. In other words, the possession in such case will be presumed to be in subordination to the legal title until proof of actual disclaimer. And this principle applies to all cases where the relation of landlord and tenant is created by mere operation of law. But there exists this important distinction between the actual and constructive relations.' The tenant in the former case

In regard to the relation of mortgagor and mortgagee, without attempting to define it it is sufficient to say that when the mortgagor retains possession, a relation is created *similar* to that of landlord and tenant, and the mortgagor is estopped to deny the title of the mortgagee;[1] unless after a distinct disclaimer brought to the knowledge of the latter he has acquired a title by adverse possession,[2] or unless the mortgage is void by statute.[3] By the mortgage the mortgagor professes to convey, and thus declares that he has an interest coextensive with what he under-

is not permitted to disclaim the landlord's title, or to set up an adverse possession, so long as the relation subsists (*a*). But in the latter case there is no such restraint imposed upon the quasi tenant, as he is styled in some of the cases. He is not within the principle that precludes a tenant from setting up an adverse title or possession. His relation is founded upon mere acquaintance, and may be terminated at any moment. He may while in possession attorn to another, or acquire an adverse title in himself; and in either case the possession is thereby changed, and the Statute of Limitations will attach. And all this is perfectly consistent with the doctrine maintained by this court in the cases of Mitchell *v.* Lipe, 8 Yerg. 179, and Wood *v.* Turner, 8 Humph. 685, 689, and other cases upon the same subject. In the former case it was held that the title of the defendant in an execution, being transferred to the purchaser by the sale and sheriff's deed, his possession afterwards was consistent with the purchaser's title; and he would, therefore, be deemed to continue the possession in the character of a quasi tenant at will until an actual disseisin or disclaimer on his part. In Wood *v.* Turner it is held that the only restriction imposed by such quasi tenancy is to preclude the execution debtor, who remains in possession of the land sold at sheriff's sale, from requiring the purchaser in an action of ejectment against the former, to produce any other evidence of title than proof of his (the defendant's) possession, a judgment and execution against him, a sale and purchase thereon, and a deed from the sheriff.'

[1] Stewart *v.* Anderson, 10 Ala. 508; Jones *v.* Reese, 65 Ala. 134; Farris *v.* Houston, 74 Ala. 162; Leary *v.* New, 90 Ind. 502; Turner *v.* First National Bank, 78 Ind. 19. Purchasers under decree of foreclosure also have the benefit of the estoppel. Leary *v.* New, supra.

[2] Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307, 314; Partridge *v.* Bere, 5 Barn. & Ald. 604; Hitchman *v.* Waltman, 4 Mees. & W. 409; Moss *v.* Sallimore, 1 Doug. 279, 282; Birch *v.* Wright, 1 T. R. 378, 383; Fisher *v.* Milmine, 94 Ill. 328; Vance *v.* Johnson, 10 Humph. 214; Willison *v.* Watkins, 3 Peters, 43,. 52; Strong *v.* Waddell, 56 Ala. 471. Of course a mortgagor with warranty or recitals (express or implied by statute) cannot say that he had no title when he executed the mortgage. Sutlive *v.* Jones, 61 Ga. 676; Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172.

[3] Brewster *v.* Madden, 15 Kans. 249.

(*a*) That is, the disclaimer cannot avail him during the tenancy; but after the tenancy has expired he may avail himself of it from the time it was made known to the landlord, and set up a title in himself under the Statute of Limitations. Willison *v.* Watkins, 3 Peters, 43; ante, p. 534.

takes to transfer; and he will not be heard to say, in contradiction of his own deed, or in opposition to a claim founded thereon, that he was guilty of a falsehood and had no estate or interest therein.[1] But a mortgagor does not, in mere virtue of retaining possession, become tenant to a mortgagee prior to his own.[2]

The same principle seems to prevail in the case of those trusts which are the mere creatures of a court of equity.[3] The possession of the trustee not being adverse to the cestui que trust, the Statute of Limitations does not run between them unless there is a clear repudiation of the trust brought home to the party so as to require him to act as upon a clearly asserted adverse title.[4] Indeed, the principle upon which such cases rest is one of the broadest in the law, to wit, that one who has received property or money from another shall not dispute the title of that person or his right to do what he has done.[5] Some special phases of this doctrine remain to be examined.

§ 2. *Estoppel under Contract for Purchase.*

The relation which the purchaser of land not fully paid for, or bought subject to condition,[6] bears to the vendor is held to be the same in effect in equity as that between landlord and tenant so far as the doctrine of estoppel is concerned.[7] The purchaser

[1] Stewart *v.* Anderson, 10 Ala. 508, quoted in Jones *v.* Reese, 65 Ala. 134, 139.

[2] Holmes *v.* Turner's Falls Co., 142 Mass. 590, 594. Field, J.: 'A prior mortgagee might enter, and the tenant might attorn to him, and this would be a good defence to an action by the mortgagor, or those claiming under him, for rent accruing subsequently to the entry; but until such an entry, and until the lessee attorns to the mortgagee, or until the mortgagee requires the lessee to pay rent to him, the mortgagee and the lessee are strangers.'

[3] Kane *v.* Bloodgood, 7 Johns. Ch. 90; Willison *v.* Watkins, 3 Peters, 43, 52; Vance *v.* Johnson, 10 Humph. 214.

[4] Merriam *v.* Hassam, 14 Allen, 516, 522; Baker *v.* Whiting, 3 Sum. 475; O'Halloran *v.* Fitzgerald, 71 Ill. 53. See Perry, Trusts, §§ 863, 864, and cases cited.

[5] See Hadley *v.* State, 66 Ind. 271; Bunger *v.* Roddy, 70 Ind. 26; O'Halloran *v.* Fitzgerald, 71 Ill. 53; Keyser *v.* Simmons, 16 Fla. 268; McKee *v.* Monterey Co., 51 Cal. 275; Placer Co. *v.* Astin, 8 Cal. 303; Perryman *v.* Greenville, 51 Ala. 507.

[6] Woburn *v.* Henshaw, 101 Mass. 103; O'Brien *v.* Wetherell, 14 Kan. 616.

[7] Quoted in Marsh *v.* Thompson, 102 Ind. 272, 277; Crumb *v.* Wright, 97 Mo. 13, 18, 19; Galloway *v.* Finley, 12 Peters, 264, 295; Willison *v.* Watkins, 3 Peters, 43, 48; Bush *v.* Marshall, 6 How. 284, 291; Bowers *v.* Kee-

cannot, while claiming under the deed, refuse to perform duties imposed by it, on the ground that it is invalid;[1] nor can he set up an outstanding title against the vendor in *bar* of a proceeding by the latter to compel payment of the purchase-money or to enforce the penalty of a broken condition.[2] In Bush *v.* Marshall, just cited, it appeared that Bush having purchased the premises in controversy from one of the plaintiffs, who at the time had no title, subsequently acquired the title, and then sought to escape the payment of the residue of the purchase-money for which Bush had given a mortgage. The plaintiffs now filed a bill to foreclose the mortgage; and their suit was sustained.[3]

The doctrine of this case is that until the grantee has paid for the land he holds in respect of the *payment* a relation of duty to the grantor similar to that of a tenant to his landlord.[4]

secker, 14 Iowa, 301, 305; Strong *v.* Waddell, 56 Ala. 471; Raley *v.* Ross, 59 Ga. 862; McMath *v.* Teel, 64 Ga. 595; Shorman *v.* Eakin, 47 Ark. 351, 354. In Willison *v.* Watkins, supra, the court remarked that the same principle applies also between trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title.

[1] Woburn *v.* Henshaw, 101 Mass. 103.

[2] O'Brien *v.* Wetherell, 14 Kan. 616.

[3] 'As to lot No. 7,' said Grier, J. for the court, 'Bush having obtained possession under Whitesides cannot by the purchase of an outstanding title defeat the claim of his vendor. It is a well-established rule of equity that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title. Searcy *v.* Kirkpatrick, Cooke, 211; Mitchel *v.* Barry, 4 Hayw. 136. Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title by the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant. The vendee cannot disavow the vendor's title. (*a*) In the present case the vendee has brought in for twenty dollars the legal title to a property worth more than two thousand, the possession of which he received from his vendor; and not only so, but contrary to good faith and fair dealing he has interfered to overbid his vendor, who was using every endeavor to purchase the title for the use of his vendee in fulfilment of his own covenants. The appellant has paid no more . . . than he agreed to pay for the purpose of getting the legal title. He has got a good title to the property, and ought in justice and equity to pay for it the full consideration which he has covenanted to pay.'

[4] Quoted in Crumb *v.* Wright, 97 Mo. 13, 18, 19.

(*a*) Quoting the language of Mr. Justice Catron in Galloway *v.* Finley, 12 Peters, 264, 295.

The case cannot be considered as holding that the relation exists beyond the duty to pay the purchase price.[1] It is certain, as we have seen, that a grantee holds adversely to his grantor, and while in possession may disclaim the title of his grantor, or purchase an outstanding title and claim under that.[2] But according to the doctrine of the case above presented the grantee could not by this means escape wholly the payment of the price agreed upon.

The relation of landlord and tenant is also virtually created, so far as the question of estoppel is concerned, where a party enters into possession of land under a contract to purchase it; and such a person, until ousted or disturbed in possession by one having a paramount title, will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his.[3] Nor will a person who has bought the right of fishery upon rental from a town be permitted, when sued for the price, to say that the town had no right to sell, unless the defendant has been evicted by title paramount.[4] A purchaser of personalty too, who takes and retains the subject of sale, is ordinarily estopped to dispute the validity of the sale when the vendor seeks to enforce the same.[5]

[1] Quoted in Crumb *v.* Wright, 97 Mo. 13, 18, 19.

[2] Ante, pp. 345, 357; Croxall *v.* Shererd, 5 Wall. 268, 287, and cases cited.

[3] Towne *v.* Butterfield, 97 Mass. 105; Lacy *v.* Johnson, 58 Wis. 414; Potts *v.* Coleman, 67 Ala. 221; Tennessee R. Co. *v.* East Alabama Ry. Co., 75 Ala. 516; Lesher *v.* Sherwin, 86 Ill. 420; Tilghman *v.* Little, 13 Ill. 239; Den d. Love *v.* Edmonston, 1 Ired. 152; Pershing *v.* Canfield, 70 Mo. 140; Smith *v.* Busby, 15 Mo. 387; Harvey *v.* Morris, 63 Mo. 475; Winnard *v.* Robbins, 3 Humph. 614; Sayles *v.* Smith, 12 Wend. 57; Jackson *v.* Ayers, 14 Johns. 224; Jackson *v.* Walker, 7 Cowen, 637; Fitzgerald *v.* Spain, 30 Ark. 95; Sanford *v.* Cloud, 17 Fla. 557. Contra, in Tennessee: Baker *v.* Hale, 6 Baxter, 46; James *v.* Patterson, 1 Swan, 312; Gudger *v.* Barnes, 4 Heisk. 570; Corder *v.* Dolin, 4 Baxter, 238. When one entering under another's sale, void for want of authority in the vendor, may hold possession and still resist payment, see Waggener *v.* Lyles, 29 Ark. 47.

[4] Eastham *v.* Anderson, 119 Mass. 526; Watertown *v.* White, 13 Mass. 477.

[5] Post, chapter 19, § 2. But see Carey *v.* Gunnison, 65 Iowa, 702, which may perhaps be doubted, though the court says that the estoppel does 'not necessarily' arise, which is true enough. The fact that the vendor would have a right of action for the value of the goods is not enough to prevent the estoppel upon the buyer; that would be equally true in the case of land. The possession taken and retained creates the estoppel.

§ 3. *Estoppel of Bailee: Receiptor of Goods.*

The relation between bailor and bailee, and that of depositor and depositary of money,[1] is analogous to that of landlord and tenant. Until something equivalent to title paramount has been *asserted* against the bailee or depositary, he will be estopped to deny the title of his bailor to the goods intrusted to him.[2] In Sinclair *v.* Murphy it appeared that the plaintiff in the lower court and one Samuel Sinclair, a brother of the defendant, had been in partnership as sutlers in the army, and that Samuel went home and did not return; that thereafter the plaintiff continued the business in his own name, claiming to have bought out his partner. Subsequently the defendant induced the plaintiff to allow him to take away, and put on deposit in bank, a portion of the funds, to be kept subject to the plaintiff's order. The plaintiff afterwards inquired of the defendant whether he had made the deposit as agreed, whereupon the defendant claimed the money as his own; and this resulted in the present action. The court held that the defendant could not question the plaintiff's right to the money.

The right of the bailor to the proceeds of goods sold by his bailee is of course of the same nature. Thus, in Osgood *v.* Nichols, just cited, the plaintiff sued the defendant for money had and received in respect of goods intrusted to him by the plaintiffs, and sold by him as auctioneer. The defendant offered to show property in himself, but the evidence was excluded. Indeed, the same rule applies between the vendor and the purchaser of goods, in an action by the vendor to recover the price. It is laid down that no principle of law can be found which would permit the purchaser (in the absence, of course, of an assertion of superior right by another) to set up in defence of the claim for the price a defect of title in the vendor. It is not

[1] Seneca *v.* Allen, 99 N. Y. 532, 539. A tax collector cannot set up the invalidity of a statute in bar of an action for money which he has collected for the plaintiff under such statute. Perryman *v.* Greenville, 51 Ala. 507.

[2] Pulliam *v.* Burlinghame, 81 Mo. 111, 116, 117; Cheesman *v.* Exall, 6 Ex. 341; Biddle *v.* Bond, 34 L. J. Q. B. 137; Sinclair *v.* Murphy, 14 Mich. 392; Osgood *v.* Nichols, 5 Gray, 420; Lund *v.* Seaman's Bank, 37 Barb. 129; The Idaho, 93 U. S. 575; Bank of Lockhaven *v.* Mason, 95 Penn. St. 113.

permitted such a party to volunteer the protection of the claims of those who do not themselves assert them.[1]

The same principle applies to the case of a receiptor for goods attached by an officer; having received possession of the goods from the officer, he must, in the absence of fraud upon him or specially modifying facts,[2] deliver them back when required by his contract. He will be estopped in trover or other suit for the goods to set up a title to them.[3] So of a wharfinger who agrees to hold goods for the plaintiff under a delivery order from a purchaser of the defendant wharfinger; he cannot resist trover for them on the ground, e. g. that they have never been separated from bulk, and that, therefore, no property passed to the person delivering.[4]

But, as has been intimated, the estoppel of the bailee ceases with dispossession by or assertion of superior right.[5] Cheesman *v.* Exall[6] is an important case upon this point. The action was trover for plate. It appeared that the plaintiff sold the plate to May and Biggenden for a valuable consideration, but for the purpose of defeating an execution. He, however, retained possession of the goods, and the judgment creditor assigned his judgment to May and Biggenden. They issued execution, whereupon the plaintiff deposited the plate with the defendant. The latter now, in the suit to recover the goods, set up the title of May and Biggenden. The court held that he had the right to do so.[7]

[1] Lund *v.* Seaman's Bank, 37 Barb. 129, Leonard, J.

[2] See Barron *v.* Cobleigh, 11 N. H. 559; Dewey *v.* Field, 4 Met. 381.

[3] Dezell *v.* Odell, 3 Hill, 215; Dresbach *v.* Minnis, 45 Cal. 223; Dewey *v.* Field, 4 Met. 381; Bursley *v.* Hamilton, 15 Pick. 40; Staples *v.* Fillmore, 43 Conn. 510; Horn *v.* Cole, 51 N. H. 287; Dorr *v.* Clark, 7 Mich. 310; Lindner *v.* Brock, 40 Mich. 618, 621; Bell *v.* Shafer, 58 Wis. 223; Case *v.* Shultz, 31 Kans. 96; Roswald *v.* Hobbie, 85 Ala. 73, 77, and cases cited.

[4] Woodley *v.* Coventry, 9 Jur. N. S. 548; s. c. 2 Hurl. & C. 164; Knights *v.* Wiffen, L. R. 5 Q. B. 660. The point is further considered in the chapter on Equitable Estoppel, post.

[5] Pulliam *v.* Burlinghame, 81 Mo. 111, 116; The Idaho, 93 U. S. 575; Matheny *v.* Mason, 73 Mo. 677; Cheesman *v.* Exall, 6 Ex. 341.

[6] 6 Ex. 341.

[7] Chief Baron Pollock said: 'My impression is that if a person pledges with another property to which he has no title and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law it constantly occurs that where stolen property has been pledged, the pawnbroker is called upon to deliver it up

The case of Biddle *v.* Bond[1] contains a clear exposition of the doctrine, and a review of the more important English cases. The case was this: The plaintiff had seized goods of one Robbins under a distress for the rent of a house alleged to have been demised by the plaintiff to Robbins, and had delivered them to the defendant, an autioneer, to sell by auction. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between the plaintiff and himself, and there was no rent in arrear. By the notice he required the defendant not to sell the goods, or if he sold them, to retain the proceeds for him. The defendant sold the goods, but refused to pay the proceeds over to the plaintiff, relying on the right of Robbins. And the court sustained him.[2]

to the rightful owner. If the servant illegally pledges his master's plate, the servant cannot recover it by an action, since the pawnbroker may inquire who is really the true owner and deliver it to him.' He also referred to Ogle *v.* Atkinson, 6 Taunt. 759, as deciding that a warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another. Mr. Baron Martin thought, however, that Mr. Justice Heath had expressed the doctrine too broadly in the case just cited in saying that the rule against setting up the jus tertii was limited to the action of ejectment. 'I do not concur,' said he, 'in thinking that there is no case except that of land in which the jus tertii may not arise. There are numerous cases in connection with wharves and docks in which, if the party intrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business.'

[1] 34 Law J. Q. B. 137.

[2] Blackburn, J. in delivering judgment, said: 'We do not question the general rule that one who has received property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it. . . . But the bailee has no better title than the bailor, and consequently if a person entitled as against the bailor to the property claims it, the bailee has no defence against him. Wilson *v.* Anderton, 1 Barn. & Ad. 450. Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or waiving the tort had sued for money had and received, the defendant would have had no defence. He was therefore compelled to yield to Robbins's claim; and it would certainly be a hardship on him if without any fault of his own the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited on the argument at the bar, and more might have been cited, such as Stonard *v.* Dunkin, 2 Camp. 344, Gosling *v.* Birnie, 7 Bing. 339, and Hawes *v.* Watson, 2 Barn. & C. 540, in which a bailee who by attorning to a purchaser of the goods has in effect represented to him that the property has passed to him, though such was not the fact, and has thereby induced him to alter his position and

It is, however, laid down in a case distinguishing Biddle *v.* Bond, that if a party accept a bailment with full knowledge, at

pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all these cases the estoppel proceeded upon the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out by Parke, B. in Cheesman *v.* Exall, 6 Ex. 341 [supra, p. 549], in the case of a pledge, and is indicated as one of the grounds on which the judgment of the Court of Common Pleas proceeded in Sheridan *v.* The New Quay Company, 4 C. B. N. S. 618, which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or misrepresentation on his part, is very analogous to that of a tenant who, having accepted the possession from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz., in Shelbury *v.* Scotsford, 1 Yelv. 22. There the plaintiff sued in assumpsit against the bailee of a horse for the breach of his contract to redeliver it. The defendant pleaded that J S, the true owner of the horse, took it from the defendant. After verdict for the defendant the plaintiff moved in arrest of judgment; but "by Fenner and Yelverton, contra, for the matter alleged by the defendant does in law discharge the promise, by reason of the former property of the horse in J S; and then it is, as it were, an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants in any sort depending upon the interest." In Wilson *v.* Anderton, 1 Barn. & Ad. 450, Littledale, J. without referring to Shelbury *v.* Scotsford, but evidently having it in mind, states the law to the same effect. And accordingly in Hardman *v.* Willcock, 9 Bing. 382, in Cheesman *v.* Exall, 6 Ex. 341, and in Sheridan *v.* The New Quay Company, 4 C. B. N. S. 618, a bailee was permitted under circumstances similar to the present to set up the jus tertii. It is true that in the first two of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff though a wrongdoer did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the jus tertii is that indicated in Shelbury *v.* Scotsford; viz. that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in Betteley *v.* Reed, 4 Q. B. 511, that "to allow a depositary of goods or money who has acknowledged the title of one person to set up the title of another who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself what-

the time, of the right of another to the property, he will be precluded from setting up that right in bar of the bailor's claim.[1] In the case just cited Mr. Justice Lush said that in Biddle *v.* Bond notice of the adverse claim was given to the auctioneer when the sale was just about taking place, and the auctioneer did not elect in favor of one of the claimants, but merely sold the goods under the authority which had been given to him by his bailor.

§ 4. *Employees: Assignees and Licensees: Patents.*

A similar rule of law applies to employees and contracting parties generally; they cannot accept the benefits of the contract and yet, when called upon to perform their duties under it, repudiate it as made without right, or as otherwise wanting in force,[2] if it is not actually in violation of law,[3] or wholly void.[4] The assignee or the licensee of any right, accepted and acted under, may accordingly be estopped to deny the authority from which the right proceeds.[5] Thus, an assignee or a licensee of a patent, apparently valid and in force,[6] who has acted under it

soever." Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B. in Thorne *v.* Tilbury, 3 Hurl. & N. 534, 537, that a bailee can set up the title of another only "if he depends upon the right and title, and by the authority of that person." Thus restricted we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.'

[1] Ex parte Davies, 19 Ch. D. 86. See Kingsman *v.* Kingsman, 6 Q. B. D. 122.

[2] See Briggs *v.* Hodgdon, 78 Maine, 514, attorney; Gayle *v.* Johnson, 80 Ala. 388; Speer *v.* Matthews, 78 Ga. 757, attorney; Burgess *v.* Badger, 124 Ill. 288, 306, 307, partner; Woburn *v.* Henshaw, 101 Mass. 103; McClure *v.* Commonwealth, 80 Penn. St. 167; Probstfield *v.* Czizek, 37 Minn. 420; New York *v.* Sonneborn, 113 N. Y. 423; Warrenton *v.* Arrington, 101 N. C. 109; Loveman *v.* Taylor, 85 Tenn. 2. The rule stated is, in some cases, no more than the old rule of equity, that the superior party in a fiduciary or a confidential relation cannot acquire rights against the beneficiary by taking advantage of this position. See 1 Bigelow, Law of Fraud, 261. See, further, chapter 21, on Election, to which doctrine the rule may also be referred, in some cases.

[3] See New York *v.* Sonneborn, supra.

[4] Dunham *v.* Reilly, infra.

[5] Commonwealth *v.* Rourke, 141 Mass. 321, license to sell intoxicating liquors; New York *v.* Sonneborn, 113 N. Y. 423; Dunham *v.* Reilly, 110 N. Y. 366.

[6] Quære in regard to a case in which the letters-patent disclose their invalidity? Comp. the cases in regard to recitals, ante, pp. 360–363.

and received profits from the sale of the patented article, will be estopped to deny the validity of the patent in an action by the patentee to recover royalties or to obtain an account.[1] In the case first cited the court says that the defendants having, under an agreement for the manufacture and sale of the patented article, actually received profits from sales of the patented machine, which profits the defendants did not show to have been in any way liable to be affected by the invalidity of the patent, the matter of the validity of the patent was immaterial. But the court proceeded to say that the defendants were estopped from alleging that invalidity. They had made and sold the machines under the complainant's title, and for his account; and they could no more be allowed to deny that title and retain the profits to their own use than an agent who has collected a debt for his principal could insist on keeping the money upon an allegation that the debt was not justly due. The invalidity of the patent did not render the sales of the machine illegal so as to taint with illegality the obligation of the defendants to account. Even when money had been received, either by an agent or by a joint owner, by force of a contract which was illegal, the agent or joint owner could not protect himself from accounting for what was so received by setting up the illegality of the transaction in which it was paid to him.[2] But a licensee of a void patent may of course set up a want of consideration in an action on the notes given for the use of the patent.[3]

[1] Kinsman *v.* Parkhurst, 18 How. 289; Marston *v.* Swett, 82 N. Y. 526, 533; Marsh *v.* Harris Manuf. Co., 63 Wis. 276, 283; Lawes *v.* Purser, 6 El. & B. 930; Noton *v.* Brooks, 7 Hurl. & N. 499; Crossley *v.* Dixon, 10 H. L. Cas. 293; Forncrook Manuf. Co. *v.* Barnum Wire Works, 54 Mich. 552; Eureka Co. *v.* Bailey, 11 Wall. 488; Jones *v.* Burnham, 67 Maine, 93. See Jackson *v.* Allen, 120 Mass. 64, 79.

[2] 'Thus,' said the court, 'when a vessel engaged in an illegal trade carried freight which came into the hands of one of the part-owners, and on a bill filed by the other part-owner for an account, the defendant relied on the illegality of the trade, but it was held to be no defence. Sharp *v.* Taylor, 2 Phil. Ch. 801. So in Tenant *v.* Elliot, 1 Bos. & P. 3, the defendant, an insurance broker, having effected an illegal insurance for the plaintiff and received the amount of a loss, endeavored to defend against the claim of his principal by showing the illegality of the insurance, but the plaintiff recovered.' See also McBlair *v.* Gibbes, 17 How. 232, 236; McMicken *v.* Perin, 18 How. 507.

[3] Saxton *v.* Dodge, 57 Barb. 84.

The patentee is not estopped, it seems, to show the invalidity of his patent against an assignee thereof who

§ 5. *Possession taken under Will or Intestacy.*

We have now to call attention to some cases of estoppel akin to those already considered, in which, however, there is no contract, or in which there may be no contract, giving to the party estopped the right of possession. Still, it will be found that the view taken of the situation is that the taking possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived. The cases referred to are successions post mortem, that is, estates devolving by testacy or intestacy upon the persons taking possession.

It is also a general principle of law that an executor or administrator of property, into possession of which he has been let under the will or letters of administration is, like a tenant, estopped while he continues in possession from disputing the title of his testator or intestate.[1] And this is true even of the widow of such representative of the estate when claiming under a title of her husband.[2] The property must be surrendered and administration abandoned before the estoppel is removed.

In a recent case[3] the question was raised whether an administrator who finds property among the assets of the estate, takes possession of it as the property of the estate, and sells it, having no claim to it himself, and no other person making claim to it, can relieve himself from liability to the estate by setting up a claim adverse to the estate. It was held that he could not. The doctrine upon which the decision was based was that a trustee who receives property as assets of the trust cannot resist his liability on the ground of an adverse title which has never been asserted against him. The court remarked that it might be that a trustee would not be estopped from setting up his own title by the acceptance of a trust in ignorance of his title, or

has sued him for infringing it. See Smith *v.* Cropper, 10 App. Cas. 249; 26 Ch. D. 700, so holding of a suit by an assignee of the patentee's trustee in bankruptcy.

[1] Smith *v.* Sutton, 74 Ga. 528.

[2] Benjamin *v.* Gill, 45 Ga. 110; Fitts *v.* Cook, 5 Cush. 596, 601; 1 Jarman, Wills, 13.

[3] Irby *v.* Kitchell, 42 Ala. 438.

through mistake, when he had done no act which it would be prejudicial to the beneficiaries for him to gainsay.[1] And so perhaps a trustee, notified of an adverse claim, would not be required to surrender the assets until that claim was settled. But these principles did not touch the point in the present case. The administrator did not pretend to have any right to the cotton, or that anybody else was claiming it. The case was an open and undisguised attempt by a trustee to avail himself of his trust to make a personal profit out of an implied defect in the title to the property which had come to his hands. It was to the credit of the law, the court strongly observed, that it did not tolerate such a thing.[2]

In the same way a devisee for life will be estopped after taking possession under the will from saying that the testator had no sufficient estate to create such interest. It is laid down to be contrary to law for one who has obtained possession under and in furtherance of the title of a devisor to say that such title is defective or insufficient.[3] In the case cited a devisee for life attempted to say that the testator was only tenant by the curtesy, and that the former had acquired a title to the premises by twenty years' adverse possession; but the court refused to hear the claim.[4]

[1] McWilliams *v.* Ramsay, 23 Ala. 813.

[2] In the case of McWilliams *v.* Ramsay, above cited, the court held that where an administrator returns chattels in his inventory as belonging to the estate, and hires them out, taking notes payable to himself as administrator, he is not estopped thereby to amend his inventory and leave them out, if they do not in fact belong to the estate. But where an administrator, who was also guardian of the intestate's heirs, charged himself as administrator with a fund, and failed to credit himself with its payment to him as guardian, and in an attempted settlement of his account as guardian refrained from charging himself therein with the fund, it was held in an action on his bond as administrator for the recovery of the fund that he was estopped to deny that he held the fund as administrator. Wilson *v.* Wilson, 17 Ohio St. 150. Concerning settlement of accounts of administrators and guardians, see also McDonald *v.* McDonald, 50 Ala. 26; Ashley *v.* Martin, ib. 537; Foust *v.* Chamblee, 51 Ala. 75; Grady *v.* Porter, 53 Cal. 680. The fact that interested parties have witnessed to the correctness of such accounts and requested the Probate Court to pass them will not in Alabama preclude them from suing in equity to correct errors therein. Monin *v.* Beroujon, 51 Ala. 196. See, however, Bell *v.* Craig, 52 Ala. 215.

[3] Board *v.* Board, L. R. 9 Q. B. 48.

[4] Anstee *v.* Nelms, 1 Hurl. & N. 232, was cited by the court.

B. *ESTOPPEL BY CONDUCT.*

CHAPTER XVIII.

ESTOPPEL BY MISREPRESENTATION, OR EQUITABLE ESTOPPEL.

§ 1. *Nature of Estoppel arising from Misrepresentation.*

IN the classes of cases arising under this head the estoppel to deny the fact does not turn in any way upon any contract to treat the fact as settled, but upon conduct which it would be unrighteous and unjust to allow the author of it to repudiate. The first class of cases, and the chief class, is where the estoppel arises from misrepresentation; to that subject we now call attention.

The typical phase of estoppel by conduct is produced by misrepresentation; and by misrepresentation is meant a false impression of some fact or set of facts, created upon the mind of one person by another, by language, or by language and conduct together, or by conduct alone equivalent to language, where there appears to be no intention to warrant the same.[1] Misrepresentation, therefore, does not include (1) impressions created in regard to one's intention to insist upon the performance of some undertaking or other duty; nor does it include (2) impressions created in regard to facts by mere negligence, when there has been no communication by the negligent person to the one receiving the impression. These two cases are entirely distinct in law from cases of misrepresentation, and will be separately considered.

In its most common aspect this estoppel is founded upon deceit, and has its justification in the duty of the courts to pre-

[1] Warranty would make a different case from that made by representation.

vent the accomplishment of fraud.[1] The estoppel consists in holding for truth a representation acted upon when the person who made it or his privies seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained.[2] The origin of the estoppel is probably to be found in the doctrine of equity[3] that if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false.[4] Lord Eldon in the case just cited speaks of this as 'a very old head of equity.'[5] But the principle had been fully adopted at law as ground for an action of deceit several years before this remark was made,[6] and though still called 'equitable estoppel' the estoppel is as fully available at law as in equity.[7]

In order to justify the interposition of equity in the case mentioned it is necessary to establish, not only the fact of misrepresentation or concealment, but also that it has been in a matter of substance or of importance to the interests of the other party, and that it has actually misled him. If the misrepresentation was of a trifling or immaterial thing, or if the party alleging it did not in fact trust in it or was not misled by it, or if it was vague or inconclusive in its nature, or if it was upon a matter of opinion or fact equally open to the knowledge of both parties, in regard to which neither could be presumed to trust the other; in these and the like cases equity will not grant relief.[8] We

[1] Jones *v.* McPhillips, 82 Ala. 102, 115, 116, and cases cited; Adler *v.* Pin, 80 Ala. 351, 354; Shipley *v.* Fox, 69 Md. 572, 579.

[2] Quoted in Lamb *v.* Trowbridge, 71 Iowa, 396, 400. In an action against another than the person who made the false representation that person could probably give evidence impeaching his representation if there were no connection between the defendant and the witness. Jordaine *v.* Lashbrooke, 7 T. R. 601 (overruling Walton *v.* Shelly, 1 T. R. 296); Townsend *v.* Bush, 1 Conn. 260; Williams *v.* Walbridge, 3 Wend. 415; Haines *v.* Dennett, 11 N. H. 180. Contra, Freon *v.* Brown, 14 Ohio, 482. Concerning the special rule in Massachusetts, see Newell *v.* Holton, 10 Gray, 349; ante, p. 480, note. And see more at length Bigelow's Bills and Notes, 174, 175.

[3] See Brewer *v.* Boston & W. R. Co., 5 Met. 478, 483.

[4] Evans *v.* Bicknell, 6 Ves. 174, 182; Slim *v.* Croucher, 1 De G. F. & J. 518; Lee *v.* Monroe, 7 Cranch, 366.

[5] Keate *v.* Phillips, 18 Ch. D. 560, 577; infra, p. 558, note 3.

[6] Pasley *v.* Freeman, 3 T. R. 51.

[7] Drexel *v.* Berney, 122 U. S. 241; Barnard *v.* German Seminary, 49 Mich. 444; Copper Mining Co. *v.* Ormsby, 47 Vt. 709.

[8] 1 Story, Eq. Jur. § 191. In Drexel *v.* Berney, supra, it is held that, to jus-

shall see in the course of the present chapter that the legal doctrine of estoppel by conduct is founded upon similar considerations. We now call attention to a few of the leading cases in which the general nature of this particular phase of estoppel by conduct is defined; and we shall then pass on to a detailed examination of the subject.

This branch of estoppel received in England its distinctive enunciation and form with the well-known case of Pickard *v.* Sears;[1] a case which bears much the same relation to this part of our subject as that of the Duchess of Kingston does to estoppel by record. The doctrine had indeed been foreshadowed and applied in a few of the earlier cases;[2] but Pickard *v.* Sears was the case in which the doctrine of the Court of Chancery was finally adopted.[3] That case was an action of trover for machinery, to which the defendant pleaded not guilty, and that the plaintiff was not possessed, etc. Issue was taken upon the pleas. On the trial at nisi prius before Lord Denman it appeared that the plaintiff was the legal owner of the machinery under a mortgage from one Metcalf, and that the property had been levied upon, subsequently to the execution of the mortgage, as Metcalf's, and sold by the sheriff to the defendants. Notice of this mortgage was given by the plaintiffs to the defendants *after* the sale to them of the property. It further appeared that after the

tify resort to equity, in respect of this 'equitable estoppel,' it is necessary that there should be some ground of equity apart from the estoppel itself; in other words, this estoppel in itself is purely legal. There cannot be any estoppel according to some cases against showing an act made void by statute. Tribble *v.* Anderson, 63 Ga. 41; Rosebrough *v.* Ansley, 35 Ohio St. 107; Bank of Cadiz *v.* Slemmons, 34 Ohio St. 142. See McKnight *v.* Pittsburgh, 91 Penn. St. 273. Contra now in New York, but not perhaps formerly. Payne *v.* Burnham, 62 N. Y. 69; Mason *v.* Anthony, 3 Keyes, 609. Comp. Wilson *v.* Western Land Co., 77 N. Car. 445, where it is held that a deed will work estoppel though executed in violation of an injunction. See post, pp. 564, 566.

[1] 6 Ad. & E. 469.

[2] Heane *v.* Rogers, 9 Barn. & C. 586; Graves *v.* Key, 3 Barn. & Ad. 318, note; Mildway *v.* Smith, 2 Saund. 348.

[3] 'The common-law doctrine of estoppel was, as I have said, a device which the common-law courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could attain an end which the Court of Chancery, without any foreign assistance, did at all times, and I hope will at all times, put into force in order to do justice.' Bacon, V. C. in Keate *v.* Phillips, 18 Ch. D. 560, 577.

seizure the plaintiff had repeatedly conversed about the same with the witness (who was the attorney of Hill, the plaintiff in the execution), sometimes in Metcalf's presence, and had *never made any claim* to the goods, though he stated that Metcalf was his debtor for about £500, and frequently consulted with the witness upon the best way of disposing of the property; that after a negotiation for sale had been made the witness had advised the plaintiff and Metcalf to try to raise £1,000 to pay off the execution creditor, the remainder to go to carry on the business; that the plaintiff had named a party from whom it was attempted, but without success, to obtain the money; and that the witness had *told the plaintiff* that the defendants were about to purchase the property. It was not disputed that the mortgage had been made in good faith, or that the defendants had purchased bona fide and without notice of the mortgage.

A plea of leave and license having been refused, the defendants suggested that it should be left to the jury to say whether the plaintiff had concurred in the sale; but his lordship was of opinion that there was no evidence of such concurrence, and directed the jury to find for the plaintiff if they thought that the mortgage had been made bona fide. A verdict having been given for the plaintiff, a rule for a new trial was now argued before Lord Denman, C. J. and Williams and Coleridge, JJ. Counsel for the plaintiff argued that the articles were in Metcalf's possession according to the intention of the mortgage deed, and that there was no badge of fraud. The property was in the plaintiff, and had never passed to the defendants. This was the only question open on the pleadings; no doubt being raised about the conversion, which alone could be disputed under the plea of not guilty. The jury should have been asked whether the plaintiff authorized the sale. Counsel for the defendants urged that the sale took place with the knowledge of the plaintiff, and virtually by his authority. He had full power to authorize a sale either generally or to a particular party; and his acts went far enough to give the authority. He could not then dispute that the sale was valid, and transferred the possession so as to support the second plea. His conduct induced the attorney of the execution creditor to change the situation of the parties;

and the case resembled that of admissions made upon which the party to whom they were made acts so as to change his situation. In such a case the party making the admission was estopped from disputing the same.[1] The decision was given in favor of the defendants.[2] And the rule was stated to be, that where one by his words or conduct wilfully [3] causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

In accordance with this case it is now a well-established principle that where the true owner of property, for however short a time, holds out another, or allows another to appear, as the owner of or as having full power of disposition over the property, the same being in the latter's *actual* possession,[4] and innocent third parties are thus led into dealing with such apparent

[1] Referring to Graves *v.* Key, 3 Barn. & Ad. 318, note; Heane *v.* Rogers, 9 Barn. & C. 586.

[2] Lord Denman, C. J. in delivering judgment, said: 'Much doubt has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendant and however much they might be evidence of the goods not being his in the sense that any persons, and amongst others the defendants, would be naturally induced thereby to believe that they were not, furnished any real proof that they were not his. His title having been once established, the property could only be divested by gift or sale; of which no specific act was even surmised. But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought in conformity to Heane *v.* Rogers and Graves *v.* Key to have been taken whether he had not in point of fact ceased to be the owner. (*a*) That opinion, in the affirmative, would have decided the second issue in the defendant's favor.'

[3] Concerning the use of this term, see post, p. 632, note.

[4] Howland *v.* Woodruff, 60 N. Y. 73, two judges dissenting. See Graybeal *v.* Davis, 95 N. Car. 508.

(*a*) This does not mean agency, though the case was argued on both sides (see supra, p. 559) as if it were a question of that sort; at all events, the estoppel is not now supposed to rest on agency. It rests upon fraud, or negligence involving a breach of duty towards him who claims the estoppel. See post, § 3.

owner, they will be protected. Or where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure whether contested at law or in equity. Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from conduct of the real owner which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale.[1]

This rule applies to married women doing business for themselves under the statutes;[2] also to heirs who assent to and encourage the sale of land by an executor who has no authority under the will to make such a sale.[3] It applies to a cestui que trust (not under disability) who allows and encourages the trustee to appear as absolute owner of the trust property, and thereby causes an innocent person to act upon that belief and to change his position; the rights of the latter will have priority over those of the cestui que trust.[4] It applies equally to the con-

[1] Anderson *v.* Armstead, 69 Ill. 452; Stewart *v.* Munford, 91 Ill. 58; Mayer *v.* Erhardt, 88 Ill. 452; Nichols *v.* Pool, 89 Ill. 491; Lewis *v.* Lanphere, 79 Ill. 187; Kinnear *v.* Mackey, 85 Ill. 96; Gridley *v.* Hopkins, 84 Ill. 528; Eldridge *v.* Walker, 80 Ill. 270; Colwell *v.* Brower, 75 Ill. 516; Carter *v.* Fately, 67 Ind. 427; Bobbitt *v.* Shryer, 70 Ind. 513; Williams *v.* Niagara Ins. Co., 50 Iowa, 561; Angell *v.* Johnson, 51 Iowa, 625; Foley *v.* Cooper, 43 Iowa, 376; Morris *v.* Shannon, 12 Bush, 89; Montague *v.* Weil, 30 La. An. 50; Bevens *v.* Weill, ib. 185; Lippmins *v.* McCranie, ib. 1251; Chapman *v.* Pingree, 67 Maine, 198; Sebright *v.* Moore, 33 Mich. 92; Ford *v.* Loomis, ib. 121; Hawkins *v.* Methodist Church, 23 Minn. 256; Pence *v.* Arbuckle, 22 Minn. 417; Mayo *v.* Leggett, 96 N. Car. 237; Redman *v.* Graham, 80 N. Car. 231; Simmons *v.* Camp, 71 Ga. 54; Kennedy *v.* Redwine, 59 Ga. 327; Jones *v.* Hawkins, 60 Ga. 52; Allen *v.* Maury, 67 Ala. 10; Powers *v.* Harris, 68 Ala. 410; Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194; McNeil *v.* Tenth National Bank, 46 N. Y. 325; Winton *v.* Hart, 39 Conn. 16; Redd *v.* Muscogee R. Co., 48 Ga. 192; Moore *v.* Metropolitan Bank, 55 N. Y. 41; McStea *v.* Matthews, 50 N. Y. 166; Pickering *v.* Busk, 15 East, 38; Gregg *v.* Wells, 10 Ad. & E. 90; Saltus *v.* Everett, 20 Wend. 267, 284; Mowrey *v.* Walsh, 8 Cow. 238; Root *v.* French, 13 Wend. 570; Horn *v.* Cole, 51 N. H. 287; Jowers *v.* Phelps, 33 Ark. 465; Grace *v.* McKissack, 49 Ala. 163; Hardigree *v.* Mitchum, 51 Ala. 151; Rabitte *v.* Orr, 83 Ala. 185.

[2] Bodine *v.* Killeen, 53 N. Y. 93.

[3] Favill *v.* Roberts, 50 N. Y. 222.

[4] Regina *v.* Shropshire Union Co., L. R. 8 Q. B. 420, Ex. Ch. See Waldron *v.* Sloper, 1 Drew. 193; Rice *v.* Rice, 2 Drew. 73. If the maker of a trust deed permit the trustee, with knowledge, to make sale of the prop-

verse case of a trustee selling his own land as that of his cestui que trust, or land in which he has an interest as that of his cestui que trust, absolutely.[1] But the rule, it is hardly necessary to say, has no application to one in possession of property who refuses to disclose the nature of his claim thereto;[2] for possession itself is notice of some kind of claim, and the purchaser buys subject to that notice.[3]

It should be observed that while the rule in Pickard *v.* Sears finds most frequent expression in transfers of property, it is not confined to such cases; it includes all cases of false representation and fraudulent silence, whatever the nature of the transaction.[4] Thus, it is laid down of a person who permits himself to appear as one of several principal makers to a promissory note, thereby inducing another to sign the same instrument as surety, that he will be estopped towards this latter party to allege that his own real relation to the paper was that of surety;[5] though the case would be different if there was no 'inducing' to the mistake.[6] So, again, if a man purchase bona fide and for value an unnegotiable chose in action from one upon whom the owner has by assignment or otherwise conferred the apparently absolute ownership, he obtains a valid title against the real owner, supposing the act of purchase to have been induced by such act of the owner.[7] So one who

erty for the creditor usury included, he will be estopped from impeaching the sale for usury. Tyler *v.* Mass. Ins. Co., 108 Ill. 58; Perkins *v.* Conant, 29 Ill. 184.

[1] Smith *v.* Hutchinson, 108 Ill. 662. It applies to the name which one adopts in executing an instrument, as e. g. a deed of land. Davis *v.* Callahan, 78 Maine, 313; Shelton *v.* Aultman, comp. 82 Ala. 315.

[2] Cunningham *v.* Milner, 56 Ala. 522.

[3] Hathaway *v.* Noble, 56 N. H. 508; 1 Bigelow, Law of Fraud, 390–393.

[4] See Rabitte *v.* Orr, 83 Ala. 185; Colquitt *v.* Smith, 76 Ga. 709; Henderson *v.* Hartman, 65 Miss. 467, estoppel to allege usury; Beals *v.* Lewis, 43 Ohio St. 220, usury; Humphreys *v.* Finch, 97 N. Car. 303, suretyship; Dair *v.* United States, 16 Wall. 1, same; State *v.* Young, 23 Minn. 549; Union Savings Assoc. *v.* Kehlor, 7 Mo. App. 158; Farley *v.* Pettes, 5 Mo. App. 262; Miles *v.* Lefi, 60 Iowa, 168; Caswell *v.* Fuller, 77 Maine, 105; Larkin *v.* Mead, 77 Ala. 485; Philadelphia *v.* Matchett, 116 Penn. St. 103.

[5] Bobbitt *v.* Shryer, 70 Ind. 513; Melms *v.* Werdehoff, 14 Wis. 18. See Keith *v.* Goodwin, 31 Vt. 268.

[6] See McGee *v.* Prouty, 9 Met. 547. It is not clear whether the plaintiff in this case was induced at all to sign the note by the (blank) signature of the defendant; apparently he was not.

[7] Moore *v.* Metropolitan Bank, 55 N. Y. 41; Hentz *v.* Miller, 94 N. Y. 64; Combes *v.* Chandler, 33 Ohio St. 178.

dates a negotiable instrument upon a week day cannot after it has passed into the hands of an innocent holder for value say that it was executed on Sunday.[1]

Again, membership of a corporation may be effected by estoppel. It is clear that one may become a stockholder in a corporation as well by acts and conduct affecting creditors and subscribers to the stock as by direct subscription.[2] Thus, a man may be estopped to deny his membership by causing or allowing stock in a corporation to be registered in his name, or otherwise holding himself out as a member of the corporation and so inducing others to join on that footing.[3] So it is held that one who, though not a subscriber, has paid a call in such a case is estopped in an action of debt for calls to deny his membership.[4] It has been held too that, when a party represents himself to a corporation as owner of shares, and demands to be registered as such, in consequence of scrip certificates purchased by him and sent in to the company, for which he has had receipts and a notice that the scrip will be exchanged for sealed certificates on demand, he will be estopped to deny his liability for calls, though the provisions of the act necessary to make him proprietor have not been complied with by the registry of his name or of the entry of transfer made.[5] Indeed, it has been broadly declared that the acceptance of stock from a corporation in one's own name as owner on the face of the transaction, and then voting thereon, will estop the party from saying that he received the stock as collateral security from the corporation and thus claiming the benefit of a statute in favor of persons holding such stock as collateral.[6] But these two

[1] Knox *v.* Clifford, 38 Wis. 651. See State Bank *v.* Thompson, 42 N. H. 369; Nelson *v.* Cowing, 20 Wend. 336; Trieher *v.* Commercial Bank, 31 Ark. 128.

[2] Merely subscribing one's name to the subscription book does not estop one to deny that one is a subscriber. Lathrop *v.* Kneeland, 46 Barb. 432.

[3] See Pullman *v.* Upton, 96 U. S. 328; National Bank *v.* Case, 99 U. S. 628, 631; Burgess *v.* Seligman, 107 U. S. 20; Fisher *v.* Seligman, 75 Mo. 13; s. c. 7 Mo. App. 383, 393; Erskine *v.* Loewenstein, 82 Mo. 301; In re Reciprocity Bank, 22 N. Y. 17.

[4] Railway Co. *v.* Graham, 2 Eng. Ry. Cas. 870; Griswold *v.* Seligman, 72 Mo. 110; Boggs *v.* Olcott, 40 Ill. 303.

[5] Railway Co. *v.* Daniel, 2 Eng. Ry. Cas. 728; Griswold *v.* Seligman, supra.

[6] Griswold *v.* Seligman, 72 Mo. 110.

propositions, while true where the rights of subsequent creditors and purchasers of the stock are concerned, have been clearly shown to be unfounded when applied to cases in which only the corporation and existing stockholders and creditors are concerned, — that is, where nobody has been misled or influenced to his hurt thereby.[1]

Further, there must have been a lawful creation of stock in the outset, to make one a stockholder. If the issue of the shares was illegal, if no sufficient steps were taken to authorize the creation of the capital stock, then though a person has acted and been treated as a stockholder in respect of shares which the company had thus no power to issue, and which therefore cannot legally exist, the person taking them cannot, by estoppel or otherwise, become a member in respect to them.[2]

The doctrine has well been referred to estoppel by conduct that where one intentionally or negligently holds oneself out or permits another to hold one out as a partner of a firm, contrary to the fact, or where late partners continue to do business in the firm name after dissolution,[3] or where a firm after having sold out their business to another suffer the purchaser to continue the business in the firm name, without anything to indicate the change, and the representation has been innocently acted upon by others without knowledge or notice of the truth of the matter, such party or parties will be held liable to such persons,[4]

[1] Burgess *v.* Seligman, 107 U. S. 20. See Bank of Hindustan *v.* Alison, L. R. 6 C. P. 54; post, § 3.

[2] American Tube Works *v.* Boston Machine Co., 139 Mass. 5, 11, C. Allen, J. Further upon this subject see Thompson, Stockholders, §§ 150 et seq.

[3] Stimson *v.* Whitney, 130 Mass. 591.

[4] Among the many cases see Miles *v.* Furber, L. R. 8 Q. B. 77; Rabitte *v.* Orr, 83 Ala. 185; Adams *v.* Morrison, 113 N. Y. 152; Newell *v.* Nixon, 4 Wall. 572; Partridge *v.* Kingman, 130 Mass. 475; Nichols *v.* James, ib. 589; Rice *v.* Barrett, 116 Mass. 312; Vibbard *v.* Roderick, 51 Barb. 616; Conklin *v.* Barton, 43 Barb. 435; Sherrod *v.* Langdon, 21 Iowa, 518; Uhl *v.* Harvey, 78 Ind. 26; Strecker *v.* Conn, 90 Ind. 469; Pepper *v.* Zahnsinger, 94 Ind. 88; Over *v.* Schiffling, 102 Ind. 191, 196; Lochte *v.* Gélé, 1 McGloin (La.), 52; Brugman *v.* McGuire, 32 Ark. 733; Campbell *v.* Hastings, 29 Ark. 512. See also Dyer *v.* Sutherland, 75 Ill. 583, concerning the effect of suing in a joint name as of partners. In Mitchell *v.* Ostrom, 2 Hill, 520, it was held that one who had signed a partnership name as a 'late firm' was not estopped to deny his joint liability on the note. Nor is it enough to raise the estoppel that goods were bought by a party in a firm name and that bills were made out and the goods shipped accordingly. Partridge *v.* Kingman, supra. See also Shirreff *v.* Wilks, 1 East, 48

and to such only.[1] So too where one man permits another in his presence to make a contract for him,[2] or where one man holds out another as possessed of authority to act for him in a particular transaction, or in a class of transactions of which the particular transaction is one, he will be estopped as against one who has been innocently induced to negotiate with the supposed agent as an agent from disputing the authority of such person to act for him.[3] This rule applies, of course, to all persons held out as authorized to act for the one against whom the estoppel is alleged, as well as to those held out strictly as agents.[4] And one may equally be estopped by misleading a person to believe that another is a principal, and so prevented from asserting that the latter was one's agent.[5] In this connection too may be noticed the large class of cases of the fraudulent filling of blanks in mercantile paper and other instruments by persons intrusted with the same;[6] which, however, as has elsewhere been remarked, are not true cases of estoppel, but cases of agency,[7] or purchaser for value without notice.[8] The question

Hawks *v.* Munger, 2 Hill, 200. A man who holds himself out as a member of a board of trade and induces others to deal with him as such will be estopped against them to deny his membership. Chicago Packing Co. *v.* Tilton, 87 Ill. 547.

[1] This is the true rule, though it has sometimes been supposed that all men may treat one as partner who holds oneself out as such. The distinction is without foundation. Upon this point, and upon the whole matter of 'holding out' as partner, see the lucid and convincing exposition by Mr. James Parsons in his recent work on Partnership, § 69 (Boston, 1889). Of course if there was an actual partnership, the liability would extend to all persons, whether there was a 'holding out' or not; holding out has no significance except where the one held out was not, in point of fact, a partner. Parsons, ut supra.

[2] James *v.* Russell, 92 N. Car. 194.

[3] Martin *v.* Webb, 110 U. S. 7, 15; Travellers' Ins. Co. *v.* Edwards, 122 U. S. 457, 468; Burton's Appeal, 93 Penn. St. 214; Frick *v.* Trustees of Schools, 99 Ill. 167; Lochte *v.* Gélé, 1 McGloin (La.), 52. In the last case the question was of the application of this rule to a special state of facts, to wit, the permitting of one's name to be kept over the place of business of another. The rule was considered to apply. See also White *v.* Morgan, 42 Iowa, 113.

[4] Lochte *v.* Gélé, supra; Frick *v.* Trustees of Schools, 99 Ill. 167, where trustees were held out for a long period of time as having certain powers.

[5] Stebbins *v.* Walker, 46 Mich. 5.

[6] See Jewell *v.* Rock River Paper Co., 101 Ill. 57; Angle *v.* Northwestern Ins. Co., 92 U. S. 330; Whitmore *v.* Nickerson, 125 Mass. 496; Greenfield Bank *v.* Stowell, 123 Mass. 196, 199; Bigelow's Bills and Notes, 571–573.

[7] Agency has sometimes been put upon the ground of estoppel in pais, as in Griswold *v.* Haven, 25 N. Y. 595. But that certainly is a mistake; there is only a misleading resemblance between the two.

[8] Ante, p. 457. Wright *v.* Lang,

is simply one of the right to dispute, not the agency altogether, but the extent of the agency, — that is, whether the act done was within the admitted agency. *There* lies the line between agency and estoppel.

In the case of a limited agency or of constructive notice of an agent's want of authority, a principal cannot ordinarily be estopped to deny the authority of his agent to make a particular representation,[1] even though the agent has expressly declared that he has such authority.[2] Thus, in the first case cited (Cox *v.* Bruce) the master of a ship having, without authority, placed quality marks on certain bales of jute consigned by him, it was held that, as the master was an agent of limited powers, his want of authority in the matter could be shown, so as to prevent the existence of any estoppel against his employers, the shipowners. In Sheffield *v.* London Joint Stock Bank an agent dealt with securities as his own which were his principal's, the person with whom he dealt having notice, though not knowledge, that the property did not belong to the agent. The House of Lords, reversing the decision of the Court of Appeal, held that the principal was not estopped to deny the agent's authority in the premises. But the case would be different, of course, if the principal in any way authorized the agent's making of a representation of his authority beyond its ordinary scope.[3]

The estoppel is not confined to the bare existence of the facts in question; it extends to the natural and legal consequences directly resulting from them.[4] And it may apply to transactions which, apart from the estoppel, would be voidable or even void (if not actually illegal, or forbidden or controlled by statute), as e. g. to a void judicial sale.[5]

One special case of title to property may be noticed here: in

66 Ala. 389, 395, on authority of Guild *v.* Thomas, 54 Ala. 414, seems to have been wrongly decided.

[1] Cox *v.* Bruce, 18 Q. B. D. 147, C. A.; Barnett *v.* South London Tramways Co., ib. 815, C. A.; Newlands *v.* National Employers' Accident Assoc., 54 L. J. 428.

[2] Sheffield *v.* London Joint Stock Bank, 13 App. Cas. 333.

[3] See Griswold *v.* Haven, 25 N. Y. 595.

[4] Dodge *v.* Pope, 93 Ind. 480, 487; Irvine *v.* Scott, 85 Ky. 260.

[5] Osborn *v.* Elder, 65 Ga. 360. Not to cases of usury. Ibid.; Tribble *v.* Anderson, 63 Ga. 31. See also p. 558, note.

Dezell *v.* Odell[1] it appeared that the plaintiff, a constable, having levied upon goods, delivered them to the defendant on his giving a receipt promising to redeliver them by a given day, and that when the day arrived he refused to comply with his promise, and claimed that the goods were his own at the time the levy was made. But the court held him estopped in trover for the goods to set up this defence,[2] on the ground that the officer had been induced to part with the possession, or to forbear taking actual possession by the defendant's recognizing his right and agreeing to take or hold for him.[3] But a receiptor is

[1] 3 Hill, 215.

[2] Dresbach *v.* Minnis, 45 Cal. 223; Bleven *v.* Freer, 10 Cal. 172; Gaff *v.* Harding, 66 Ill. 61; Dewey *v.* Field, 4 Met. 381; Horn *v.* Cole, 51 N. H. 287; The Struggle, 1 Gall. 476; George *v.* Tate, 102 U. S. 564, 571; Roswald *v.* Hobbie, 85 Ala. 73, 77; Sponenbarger *v.* Lemert, 23 Kans. 55; Haxtun *v.* Sizer, ib. 310; Bursley *v.* Hamilton, 15 Pick. 40; Staples *v.* Fillmore, 43 Conn. 510; Dorr *v.* Clark, 7 Mich. 310; Williams *v.* Vail, 9 Mich. 162; Burk *v.* Webb, 32 Mich. 173; Lindner *v.* Brock, 40 Mich. 618, 621; Easton *v.* Goodwin, 22 Minn. 426; Scanlan *v.* O'Brien, 21 Minn. 434. See Knights *v.* Wiffen, L. R. 4 Q. B. 660; Lewis *v.* Webber, 116 Mass. 450; Learned *v.* Bryant, 13 Mass. 224; Anthony *v.* Bartholomew, 69 Mo. 186; Diossy *v.* Morgan, 74 N. Y. 11; Harrison *v.* Wilkin, 78 N. Y. 390; Perry *v.* Williams, 39 Wis. 339; Bell *v.* Shafer, 58 Wis. 223; Hundley *v.* Filbert, 73 Mo. 84; Brown *v.* Hamil, 76 Ala. 506, 509; Easly *v.* Walker, 10 Ala. 671; Adler *v.* Potter, 57 Ala. 571; Garrity *v.* Thompson, 64 Texas, 597; Adoue *v.* Seeligson, 54 Texas, 593; Trueblood *v.* Knox, 73 Ind. 310.

If a man claiming an interest in property attached as that of another join in a (statutory) replevin bond as surety, he thereby admits that the property belongs to the person against whom the attachment is made, and he cannot afterwards, especially after judgment in favor of the plaintiff in the attachment suit, assert his claim against that party. 'Statutory replevin bond is not the form in which adversary claim to property can be asserted. It proceeds on the concession that the property seized belongs to the defendant, and the bond is given to save the expense of safe custody, and to secure its return to the possession of the defendant, to remain there until the suit is determined.' Brown *v.* Hamil, 76 Ala. 506, 508, Stone, C. J. See Mead *v.* Figh, 4 Ala. 279; Dunlap *v.* Clements, 17 Ala. 778; Cooper *v.* Peck, 22 Ala. 406; Mitchell *v.* Ingram, 38 Ala. 395.

[3] Cowen, J. speaking for the court, said: 'It may be conceded that had the defendant's claim been interposed at the time of the levy, and he had signed the receipt in terms without prejudice to his right, the question would have been open. The creditor would thus have been put upon his guard and enabled to seek for other property, on finding that his debtor had no title to that in question. Indeed, here was a course of action on the part of the receiptor directly calculated to influence the conduct of the creditor in a way prejudicial to his interests, unless we hold the receiptor. The officer being induced to part with the possession or to forbear taking actual possession by the receiptor recognizing his right and agreeing to take or hold for him, was itself an injury; if we now let the defendant go free, we then have a clear case of an admission by the defendant, intended to influence the conduct of the man

not in all cases estopped to assert his own title to the property. If the property has not been delivered back to him, he will not be estopped to claim it.[1] So if the admission consisted of mere formal statements which were deemed unimportant at the time, and no one was deceived by them or induced to alter his position, the party is not bound.[2] Where, however, the defendant knowing all the facts relating to his own title gave an attaching officer a receipt therefor, promising to deliver the property on demand, and gave no notice that he claimed it as his own, and it appeared that when the attachment was made and the receipt given there was other property of the debtor which the officer

with whom he was dealing and actually leading him into a line of conduct which must be prejudicial to his interests unless the defendant be cut off from the power of retraction. This I understood to be the very definition of an estoppel in pais. For the prevention of fraud the law holds the admission to be conclusive. The principle is the same as that which prevails between landlord and tenant. The latter must surrender possession simply because he has received it. The general doctrine is not denied. The argument is that it should not be applied in favor of an officer coming under pretence of legal authority and demanding the property. It is thought the receiptor should be taken to have been coerced into the giving of a receipt as the only expedient for retaining the possession. I think otherwise. If a man have a title, an officer is no more in respect to him than a mere stranger. He may either use the necessary force to retain possession, or take the more usual and prudent course of an action at law for the wrongful seizure. In short, his remedies are in this respect the same as those of any other proprietor whose rights are improperly interfered with. The intendment against him is therefore the same as it would be against a man in possession of land taking a demise from an adverse claimant. It is not enough for him afterwards to show that he had title. If he can show in addition that he was drawn into the admission of an adverse title by fraud, or perhaps by some gross mistake of fact, he may be able to defend himself. [See ante, pp. 524–534.] But by taking and holding he draws the onus of showing the fraud or mistake upon himself. The defendant below offered no proof of the kind; but, on the contrary, it is entirely apparent that the title which he proposed to set up at the trial was known to him at the time of the levy and receipt. The officer was, when he came to sell, for the first time apprised that the defendant had title. This was in general terms. At the trial he proposed to show that he had purchased it of a third person with his own funds. In short, his conduct may be summed up in this way: He had fraudulently deprived the creditor of possession through the officer, baffled him in his search for other property, and in the use of all means for collecting his debt, drawn him by equivocal conduct into the expense of an action, and at the trial claims the whole as constituting a legal defence. I think it was not so for the simple reason that the law uniformly throws the consequence of such a course upon the party who leads in it, by applying the salutary doctrine of estoppel in pais.'

[1] Case *v.* Shultz, 31 Kans. 96.

[2] Barron *v.* Cobleigh, 11 N. H. 559; Dewey *v.* Field, 4 Met. 381.

would have attached if the defendant had then set up his claim and refused to give the receipt, it was held that the defendant was estopped to set up a title in himself to the property.[1]

The doctrine of Pickard *v.* Sears had been declared and enforced several years earlier in America,[2] though no distinct definition of the estoppel was given in the case first referred to. The plaintiff (Baird) in that case declared in trover for the conversion of certain lumber. It appeared that the lumber was the joint property of the defendant Stephens and one Benedict, one fifth of it belonging to Benedict and the rest to Stephens. The plaintiff had purchased the lumber under an execution sale against Benedict, which sale had taken place in this way: The execution creditor sent the officer to Stephens, told him he had an execution against Benedict, and asked him to point out to him the lumber which Benedict owned. Stephens then showed him a quantity, and told him that Benedict owned a fifth part of it. Such a part was then levied upon and receipted for, and sold to Baird without notice of any claim by Stephens. The latter now attempted to set up the defence that Benedict's interest was under a special executory contract which he had not performed; but the court refused to hear the defence on the ground that it would be a violation of good faith to permit Stephens now to set up any special agreement between him and Benedict to defeat the title of the plaintiff below, who was a bona fide purchaser at the constable's sale.[3]

To constitute this particular estoppel by conduct, represented by Pickard *v.* Sears, all the following elements must be present:[4] —

[1] Dewey *v.* Field, 4 Met. 381. See also Ladrick *v.* Briggs, 105 Mass. 508; Heath *v.* Keyes, 35 Wis. 668. If the condition of a delivery bond is that the property shall be delivered to the plaintiff in the suit if the delivery is adjudged to him, a surety in the bond may set up an interest in the property. Rathbone *v.* Boyd, 30 Kans. 485.

[2] Stephens *v.* Baird, 9 Cowen, 274; Welland Canal Co. *v.* Hathaway, 8 Wend. 480.

[3] See Dewey *v.* Field, supra.

[4] Blodgett *v.* Perry, 97 Mo. 263, 273; Kraft *v.* Baxter, 38 Kans. 351, 356; Taylor *v.* Nashville R. Co., 86 Tenn. 228, 244; Equitable Mortgage Co. *v.* Norton, 71 Texas, 683, 689; Bynum *v.* Preston, 69 Texas, 287, 291; Steed *v.* Petty, 65 Texas, 490–495; Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639, 649; Stevens *v.* Dennett, 51 N. H. 324; People *v.* Brown, 67 Ill. 435; Martin *v.* Zellerbach, 38 Cal. 300,

1. There must have been a false representation or a concealment of material facts.[1]

2. The representation must have been made with knowledge, actual or virtual, of the facts.[2]

3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

5. The other party must have been induced to act upon it.

The consideration of each of these elements in detail[3] must occupy the remainder of this chapter.

§ 2. *The Representation.*

It is important to remember[4] that the term 'representation' includes both express and implied statements.[5] It is not necessary that there should be an express statement; whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term.[6] Indeed, the term, as we have seen

315; Turnipseed *v.* Hudson, 50 Miss. 429; May *v.* Gates, 137 Mass. 389, 392; Acton *v.* Dooley, 74 Mo. 63, 67; Hosford *v.* Johnson, 74 Ind. 479, 485.

[1] Pittsburg *v.* Danforth, 56 N. H. 272.

[2] Wright's Appeal, 99 Penn. St. 425, 432.

[3] The elements of the estoppel with their qualifications should be considered in connection with the elements of the action of deceit; to which there is the closest correspondence. See Freeman *v.* Cooke, 2 Ex. 654; Swan *v.* North British Co., 7 Hurl. & N. 603, Martin, B.; Bigelow, Torts, ch. 1, Students' Series, and Fraud, ch. 1; and especially the present writer's note in 1 Story's Equity, pp. 204 et seq., 13th ed.

[4] See the definition, ante, p. 556.

[5] Peery *v.* Hall, 75 Mo. 503, 507.

[6] This is well brought out in the four propositions of Mr. Justice Brett (now Lord Esher) in the well-known case of Carr *v.* London Ry. Co., L. R. 10 C. P. 307, 316, 317, which for convenience may be here given in full. They were thus put: (1) If a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. (2) If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. (3) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter

and shall see further, practically includes silence in certain cases; silence where one is bound to speak (in regard to which later) is ordinarily equivalent to an admission of the fact. Thus, the witnessing of a deed to one's own land, done with knowledge of the real state of the title, for a grantee ignorant of the rights of the witness, will, at least in equity, estop the witness to set up against the grantee a claim to the land existing in the witness when the deed was executed.[1] On the other hand, a representation in pais[2] in writing,[3] when not part of a deed or made the subject of a contract, though on oath, is no more efficacious, so far as the question of estoppel is concerned, than a verbal statement.[4]

was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented. (4) If, in the transaction which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.

These propositions are intended to be severally exclusive of each other, and to constitute an epitome of the law of estoppel by misrepresentation. Seton *v.* Lafone, 19 Q. B. D. 68, 70, Lord Esher.

[1] Hale *v.* Skinner, 117 Mass. 474; Stevens *v.* Dennett, 51 N. H. 324. And procuring another to witness one's deed estops one to deny the witness's competency, at least if the facts were known. Hill *v.* Hill, 53 Vt. 578. See also Morse *v.* Byam, 55 Mich. 594. A fortiori, if A *join* with B in a deed, e. g. a lease, in which the property is represented to belong to B, A will be estopped to deny the title of B's devisee to the property, especially if for many years, down to the death of B, A made no claim against the truth of the representation. Laughlin *v.* Mitchell, 121 U. S. 411.

[2] Sworn statements in pleadings and depositions, and solemn admissions in judicio (but not the admissions of a witness on the stand. Wilkinson *v.* Wilson, 71 Ga. 497. Contra and bad law, Folger *v.* Palmer, 35 La. An. 743), are ordinarily conclusive, though not if inconsiderate or without full knowledge. Allen *v.* Westbrook, 16 Lea, 251, disclaimer of title to property; Smith *v.* Fowler, 12 Lea, 163, 171; Chilton *v.* Scrugge, 5 Lea, 308; Watterson *v.* Lyons, 9 Lea, 566, 571; McEwen *v.* Jenks, 6 Lea, 289; Stephenson *v.* Walker, 8 Baxter, 289; Cooley *v.* State, 2 Head, 608; Stillman *v.* Stillman, 7 Baxter, 169; Hamilton *v.* Zimmerman, 5 Sneed, 39; Cook *v.* McCahill, 41 N. J. Eq. 69; Miller *v.* Wilkins, 79 Ga. 675; Cheney *v.* Selman, 71 Ga. 384; Clark *v.* Clark, 70 Ga. 862; Gresham *v.* Ware, 79 Ala. 192, admission in answer; Prentice *v.* Stefan, 72 Wis. 151, admission of service of process.

[3] Cummins *v.* Agricultural Ins. Co., 67 N. Y. 260. So in a pleading. Chatfield *v.* Simonson, 92 N. Y. 209; Russell *v.* Kierney, 1 Sandf. Ch. 34.

[4] Connecticut Ins. Co. *v.* Schwenk, 94 U. S. 593, 596; McMasters *v.* Insurance Co., 55 N. Y. 222; Darke *v.* Bush, 57 Ga. 180; Savage *v.* Dowd, 54 Miss. 728, married woman. This, how-

The representation in order to work an estoppel must be of a nature to lead naturally, i. e. to lead a man of prudence, to the action taken.[1] Hence, in the first place, it must generally be a material statement of *fact*.[2] It can seldom happen that a statement of opinion or of a proposition of law[3] will conclude the party making it from denying its correctness; except where it is understood to mean nothing but a simple statement of fact.[4] Thus, if an indorser of a note were to say that he was liable thereon, and show the notice of dishonor, he could not afterwards allege against one who had thereby been induced to purchase the note that he had not received notice of dishonor;[5] or if by his conduct he were plainly to affirm that he had received notice of dishonor, he could not deny the fact.[6] But if the representation were that he was liable by reason of a demand made upon the maker before daylight or at midnight,[7] he would not be estopped to deny his liability; unless, indeed, he was reasonably understood as agreeing not to assert his rights. The rule we apprehend to be this; that where the statement or conduct is not resolvable into a statement of fact as distinguished from a statement of opinion or of law, and does not amount to a contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a

ever, is not to say that a statement or affidavit may be permitted to stand and the party who made it act inconsistently with it. Davis *v.* C. R. Co., 40 Iowa, 292. A man must act consistently so far as the rights of others dealing with him are concerned.

[1] Hefner *v.* Vandolah, 57 Ill. 520; Howe Machine Co. *v.* Farrington, 82 N. Y. 121. See First Evang. Church *v.* Walsh, ib. 363.

[2] Hammerslough *v.* Kansas City Assoc., 79 Mo. 81; Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548; Frame *v.* Badger, 79 Ill. 441; McGirr *v.* Sell, 60 Ind. 249.

[3] There may arise, it seems, an estoppel by representation to deny negotiability to an instrument, though apart from the estoppel the question of negotiability would be a question of law. See Goodwin *v.* Robarts, 1 App. Cas. 476, Lord Cairns; Fine Art Soc. *v.* Union Bank, 17 Q. B. D. 703, C. A.; Colonial Bank *v.* Hepworth, 36 Ch. D. 36, 53. No notice was taken in these cases of the fact that the representation was one of law. It seems probable that the rule against such representations has been pressed too far. Comp. Lucy *v.* Gray, 61 N. H. 151; ante, p. 375, note.

[4] Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639, 649, quoting the text; Whitwell *v.* Winslow, 134 Mass. 343. But see Mattoon *v.* Young, 5 N. Y. Supreme Ct. 109; s. c. 45 N. Y. 696.

[5] St. John *v.* Roberts, 31 N. Y. 441.

[6] Libbey *v.* Pierce, 47 N. H. 309.

[7] Or if one should represent a non-negotiable note to be negotiable. Whitwell *v.* Winslow, 134 Mass. 343.

relation of confidence towards him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law from a comparison of facts, propositions, or the like, and a fortiori if it is the declaration of a supposed rule of law, the party may, with the qualification stated in the last sentence, allege its incorrectness.[1] If, however, the conclusion were part of a contract, as for the settlement of disputed rights between the parties, it would be conclusive, at least after it had been acted upon, though the contract were not under seal; since the law would uphold the contract.[2]

The rule in regard to statements of opinion and statements of law is, it seems, based upon the ground that the truth is uncertain, or that the person to whom the statement is made knows as much about the matter as the other. When this is not the case, when the person making the statement in the form of an opinion, or perhaps of a rule of law, knows of facts which make the 'opinion' a sham, or knows that his rule of law is false, he has really made a misrepresentation of fact in the one case, and of something in the nature of fact in the other (in that his statement amounts to an assertion that the law has been so laid down); and then if the rest of the elements required in ordinary cases of misrepresentation are present, the estoppel is made out. So too real opinion may probably come within the notice of the law, in certain cases of trust and confidence. An example may be given:—

A representation of value, though, as resting on the ground of a statement of opinion, ordinarily unattended with any legal consequences,[3]—'simplex commendatio non obligat,'—may in prac-

[1] See Whitwell *v.* Winslow, 134 Mass. 343; Chatfield *v.* Simonson, 92 N. Y. 209, 218; Brewster *v.* Striker, 2 Comst. 19; Norton *v.* Coons, 6 N. Y. 33; 1 Story's Equity, pp. 206, 207, 13th ed., note by the present writer; Wise *v.* Fuller, 29 N. J. Eq. 262; Suessenguth *v.* Bingenheimer, 40 Wis. 370; Birdsey *v.* Butterfield, 34 Wis. 52; Pike *v.* Fay, 101 Mass. 134, 137; Soward *v.* Johnston, 65 Mo. 102 (opinion of an attorney as to a title. But see Hart *v.* Bullion, 48 Texas, 278); Hammerslough *v.* Kansas City Assoc., 79 Mo. 81; Tilton *v.* Nelson, 27 Barb. 595; Storrs *v.* Barker, 6 Johns. Ch. 166. Representation of another's credit may be acted upon. Hendershot *v.* Henry, 63 Iowa, 744; Pasley *v.* Freeman, 3 T. R. 51; s. c. Bigelow's L. C. Torts, 1.

[2] See 1 Story, Contracts, § 571, 5th ed. In Carpenter *v.* Buller, 8 Mees. & W. 209, 212, Parke, B. says that a recital in instruments not under seal may be such as to be conclusive.

[3] Deming *v.* Darling, 148 Mass. 504.

tical operation sometimes acquire the standing of a statement of fact. This will be the case, and the law will take cognizance of it, it seems, where special trust and confidence is known to be reposed in the party making the representation, and he actually or virtually claims the knowledge of an expert, or where he stands in a confidential relation towards the one to whom he makes the representation and with whom he is dealing on that footing.[1] The same may also be true where the person dealing upon the faith of the representation has no means, or very inadequate means, of knowing the facts. Thus, if a shipper represents and agrees that the goods delivered to the carrier are of a certain value, and the carrier is thereby induced to grant him a particular rate for carriage, the shipper, on a loss of the goods, will be estopped to claim that they are worth more than represented.[2] But such a case, it must be admitted, approaches to a representation of fact; and the whole suggestion in regard to real opinion treads on delicate ground.[3]

The representation or concealment must, in the second place, like a recital,[4] in all ordinary cases have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract,[5] or to a waiver of some term

[1] See 1 Story's Equity, pp. 207, 208, 13th ed.

[2] Graves *v.* Lake Shore R. Co., 137 Mass. 33. The case is not made different by the fact that the loss was caused by negligence. Ibid.

[3] Deming *v.* Darling, 148 Mass. 504.

[4] See ante, p. 366.

[5] Jackson *v.* Allen, 120 Mass. 64, 79; Langdon *v.* Doud, 10 Allen, 433; s. c. 6 Allen, 423; Maddison *v.* Alderson, 8 App. Cas. 467, 473 (denying Loftus *v.* Maw, 3 Giff. 592); s. c. (Alderson *v.* Maddison) 5 Ex. D. 293; Jordan *v.* Money, 5 H. L. Cas. 185; Insurance Co. *v.* Mowry, 96 U. S. 544; Burgess *v.* Seligman, 107 U. S. 20, 32; Allen *v.* Rundle, 50 Conn. 9; White *v.* Ashton, 51 N. Y. 280; Edwards *v.* Dickson, 66 Texas, 613, 617; Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639, 649; Turnipseed *v.* Hudson, 50 Miss. 429; Allen *v.* Hodge, 51 Vt. 436; Starry *v.* Korab, 65 Iowa, 267. See Lites *v.* Addison, 27 S. Car. 226, 232; Botts *v.* Fultz, 70 Ind. 396; Conklin *v.* Conklin, 54 Ind. 289. Simonton *v.* Liverpool Ins. Co., 51 Ga. 76, seems to assume the contrary; but the representation or rather promise was not sufficiently acted upon. See also Brightman *v.* Hicks, 108 Mass. 246, where it was held that a promise within the Statute of Frauds could not be made binding by way of estoppel though it had been acted upon. So of a contract void on grounds of public policy. Langan *v.* Sankey, 55 Iowa, 52.

of a contract or of the performance of some other kind of duty.[1] The point is well illustrated in Langdon *v.* Doud, just cited, where the plaintiff sued the defendant as maker of a promissory note; to which the Statute of Limitations was pleaded. The plaintiff introduced evidence to show that in March, 1855, the defendant, who then lived in Massachusetts, told the plaintiff that he was going to California in about a month from that time, never to return, and would within that month pay the note; and that he left for California the next day, and remained there till the autumn of 1858, when he returned to Massachusetts. The plaintiff also offered evidence to prove that he was induced by the defendant's statements to believe that the defendant never would return to Massachusetts, and therefore did not bring any suit during his absence, believing that the defendant intended to reside in California, and that if he should happen to return, the time of his absence would be excluded; but the evidence was not received.[2]

[1] This waiver may be called an estoppel, but it will stand upon a ground of its own. See chapter 19.

[2] Having stated the general rule in respect to misrepresentations which have been acted upon, Bigelow, C. J. speaking for the court, further observed: 'Such a representation is sometimes, though not very accurately, said to operate as an estoppel; but its effect is rather to shut out a party from offering evidence in a court of justice contrary to previous statements. Howard *v.* Hudson, 2 El. & B. 1; Audenried *v.* Betteley, 5 Allen, 382; Plumer *v.* Lord, 9 Allen, 455. Without undertaking to define the nature or kind of representations which will thus operate to preclude a party, we think it very clear that the statement proved at the trial of this case, which the plaintiff seeks to set up for the purpose of excluding the defence of the Statute of Limitations, does not come within the rule. In the first place, it does not appear that the representation made by the defendant of his intention to abandon his domicile in Massachusetts and to take up his residence in California was not perfectly true at the time it was made, and that he did not make it in entire good faith and with the purpose of carrying it into execution. This, however, may not be a decisive consideration. But in the next place, it was a representation only of a present intention or purpose. It was not a statement of a fact or state of things *actually existing, or past and executed*, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct and induced to change his position in the manner alleged by the plaintiff. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfilment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. Especially is this true in regard to the place of one's domicile. On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain and defi-

The difference between estoppel in pais and contract may be further illustrated: A consigns a cargo of freight by B from New York to New Orleans, and B assures A that the freight will arrive at New Orleans on a day named. A makes his preparations to receive it, and charters a steamer to take it on the day named and convey it up the Red River. The cargo is not delivered to A when due, and he brings trover against B, based on its arrival at New Orleans on the particular day and its conversion then and there. Will B be estopped to deny the arrival of the cargo on the day alleged by reason of his representation that it should then arrive? Certainly not, if it was only a representation, however strongly made and however certain it may be that A acted upon it in good faith, for the reason that in the nature of things the event was uncertain; it was a mere expression of intention, and A should not have placed such implicit reliance upon the statement. The event was future, and whether it would transpire could not be known. Nor could B be estopped if the statement had gone further and become a contract that the goods should arrive on the particular day. The case would then be simply a breach of contract, for which B would be liable in a proper form of action; but he could not be compelled to pay the value of the cargo on the ground that he was estopped to deny the arrival of the goods at the time agreed upon.[1] So too it may be broadly stated that a parol promise made in conjunction with and intended to constitute one of the terms of a written contract but not incorporated into the written instrument cannot operate by estoppel;[2] though cases may arise where *fraudulent* promises of that kind would

nite fact or state of things, permanent in its nature and not liable to change. A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed. . . . The reason [of the doctrine of estoppel] wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action.' See Jordan *v.* Money, 5 H. L. Cas. 185; Caton *v.* Caton, 34 Law J. Ch. 564; Maddison *v.* Alderson, 8 App. Cas. 467.

[1] See also Starry *v.* Korab, 65 Iowa, 267.

[2] Insurance Co. *v.* Mowry, 96 U. S. 544.

be entitled to the consideration of the courts, and justify an estoppel.[1]

Situations may arise, indeed, in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favor of the injured party. In such a case the estoppel may sometimes be available to prevent fraud and a circuity of action. Thus, where a mortgagee of lands who had persuaded a son of the mortgagor, after the death of the latter and when the land was of little value, the son contemplating at the time a removal to another region, to remain on the land and take care of it and support the family of his deceased father, upon a promise that the mortgage should never be enforced against the family, it was held that he would be estopped thereby after the lapse of several years, during which time the son had cultivated the land and cared for the family, and the land had grown valuable under his tillage, from taking any steps to foreclose the mortgage.[2] It has been held too that if A induce B to rent his land to C by promising not to interfere with the collection of rent, A will be estopped from so interfering.[3] So where a person divided a parcel of land and sold it in town lots representing to the purchasers that streets were to be extended through it and bounding the lots accordingly, he was held estopped to deny a dedication to the public.[4]

Indeed, an intended contract, ineffectual as such by reason of the omission of some formal step required by law, may generate an estoppel when a manifest fraud would result from treating the whole transaction as wanting in validity.[5] Thus, a grantee

[1] Insurance Co. *v.* Mowry, 96 U. S. 544; Shields *v.* Smith, 37 Ark. 47; Kimball *v.* Ætna Ins. Co., 9 Allen, 540.

[2] Faxton *v.* Faxon, 28 Mich. 159.

[3] Crime *v.* Davis, 68 Ga. 138. See Pausch *v.* Guerrard, 67 Ga. 319. Sed quære, if damages would suffice.

[4] Mansur *v.* Haughey, 60 Ind. 364. See also Lomax *v.* Smyth, 50 Iowa, 223; Southard *v.* Sutton, 68 Maine, 575.

[5] See the following proposition laid down in substance in White *v.* Walker, 31 Ill. 422, 437: Though a promise to forgive a debt or to forbear its collection either temporarily or for an indefinite period, unsupported by any consideration, is ineffectual as a defence viewed merely as an agreement; yet if the surety has been induced by such an assurance to neglect any of the means which might have been used for his indemnity, the promise may have that effect as an estoppel which it wants as a contract, and amount to a defence against any subsequent action brought

destroying his deed with intent thereby to reinvest the grantor with the title conveyed by him will be estopped to claim that his act was without effect (on account of the want of a new conveyance) if otherwise a fraud would be perpetrated upon the grantor.[1] But it is different if no fraud would result.[2] And it is enough in regard to all these cases of contract to say that they are not cases of estoppel by misrepresentation; they stand upon ground of their own.[3]

The representation, further, to justify a prudent man in acting upon it, must be plain, not doubtful, or matter of questionable inference.[4] *Certainty* is essential to all estoppels.[5] The courts will not readily suffer a man to be deprived of his property where he had no intention to part with it.[6] Thus, in the case of Townsend Bank *v.* Todd,[7] it appeared that a savings bank, in

by the creditor. See Harris *v.* Brooks, 21 Pick. 195.

[1] Dukes *v.* Spangler, 35 Ohio St. 119, 126; Farrar *v.* Farrar, 4 N. H. 191; Trull *v.* Skinner, 17 Pick. 213; post, p. 672, note. See Stanley *v.* Epperson, 45 Texas, 645; Herrick *v.* Malin, 22 Wend. 388; Morgan *v.* Elam, 4 Yerg. 375. The result should be noticed that though there is an estoppel between the parties there is no conveyance; towards strangers without notice the title still remains in the grantee. Ibid.

[2] Dukes *v.* Spangler, supra; Jeffers *v.* Philo, 35 Ohio St. 173.

[3] With these cases comp. the whole subject of Estoppel by Contract, shortly explained ante, p. 455. Comp. also cases of Waiver, post, chapter 20.

[4] Townsend Bank *v.* Todd, 47 Conn. 190; Burgess *v.* Seligman, 107 U. S. 20, 32; Belle of the Sea, 20 Wall. 421; Johnson *v.* Owen, 33 Iowa, 512; Davenport R. Co. *v.* Davenport Gas Co., 43 Iowa, 301; Bennett *v.* Dean, 41 Mich. 472; s. c. 35 Mich. 306; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; Rust *v.* Bennett, 39 Mich. 521; Michigan Panelling Co. *v.* Parsell, 38 Mich. 475; Fredenburg *v.* Lyon Lake Church, 37 Mich. 476; Moors *v.* Albro, 129 Mass. 9, 13; Roach *v.* Brannon, 57 Miss. 490, 505; International Bank *v.* German Bank, 3 Mo. App. 361, 371; Turnipseed *v.* Hudson, 50 Miss. 429; Mojarrieta *v.* Saenz, 80 N. Y. 547; Keating *v.* Orne, 77 Penn. St. 89; Walker *v.* Carleton, 97 Ill. 582; Tillotson *v.* Mitchell, 111 Ill. 518; Lawrence Univ. *v.* Smith, 32 Wis. 587.

[5] Coke, Litt. 352 b; German *v.* Clark, 71 N. Car. 417; Van Bibber *v.* Beirne, 6 W. Va. 168; Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639, 650. So of waiver; that to which the right is waived should be clearly described and identified. A waiver, e. g. of a particular right in all lands now owned or hereafter acquired is held of no force. Stafford *v.* Elliott, 59 Ga. 837. See also Merrill *v.* Welsher, 50 Iowa, 61, holding that for a party merely to advise that collecting taxes for his benefit be suspended is not enough to estop him from afterwards requiring collection of them.

[6] Blodgett *v.* Perry, 97 Mo. 263, 273; Preble *v.* Conger, 66 Ill. 370; Seymour *v.* Page, 33 Conn. 61. See Flower *v.* Elwood, ib. 438; Glazier *v.* Streamer, 57 Ill. 91; Barron *v.* Cobleigh, 11 N. H. 559; Palmer *v.* Williams, 24 Mich. 328; Ripley *v.* Billings, 46 Vt. 542.

[7] 47 Conn. 190.

the hands of receivers, held a satisfied mortgage, the equitable title to which was in A; while T and wife were in possession claiming against him. A brought ejectment in the name and with the consent of the receivers. Meantime an undivided interest in the land had, contrary to law, been sold for taxes to J, who afterwards conveyed the same with warranty to the wife of T. Before J sold to her he was informed by one of the receivers of the bank, in the absence of A, that the bank had no claim upon the property. About the same time A, in reply to an inquiry, told J that he *then* had no title to the property, that he ought to have one, but had not been able to get any; and afterwards, before J sold the property, A met him, by appointment, on the premises, when it was agreed that upon A's obtaining his title from the bank, J should release his tax title for a reasonable consideration. J informed T, who was now about making the purchase for his wife, of what had been said; and this influenced T in buying, and also led J to give a warranty deed. J was now vouched in to warrant his deed and defend the cause, and appearing took the position that A was estopped to claim the land. The court held the contrary, one of the grounds taken being that A's statements had not been certain and definite, so as to justify action upon them.

On the other hand, a plain representation cannot be cut down from its natural and proper import in the particular situation or transaction.[1] A person who has made a representation cannot escape the consequences by showing that in a literal sense it is true, if in its natural sense it is untrue. A half truth too is generally a whole lie in effect;[2] if the part suppressed would make the part stated false, there is a false representation,[3] that is, the representation is taken to consist of the part stated

[1] This import, therefore, may be technical and peculiar; or popular, according to the business concerned, modified, of course, by any actual understanding of both parties.

[2] See Peek *v.* Gurney, L. R. 6 H. L. 377; Tapp *v.* Lee, 3 Bos. & P. 367; Corbett *v.* Brown, 8 Bing. 33; 1 Story's Equity, p. 208, 13th ed.

[3] Peek *v.* Gurney, supra, at p. 403; Central Ry. Co. *v.* Kisch, L. R. 2 H. L. 99, 113. The case of Corbett *v.* Brown, supra, contains a striking illustration. See 1 Story's Equity, p. 208, 13th ed. But none of the cases cited in this note are cases of estoppel; hence they are not stated here. There can be no doubt, however, that they are applicable to the present subject.

and a denial of anything to the contrary. This assumes, of course, that the stated part is a clear, positive statement of fact. Thus, a representation that shares of stock are paid up must reasonably be understood, and so must be held, to mean that they are paid up in cash.[1] Indeed, the books abound with illustrations.

The case of Guthrie *v.* Quinn[2] will illustrate the point. This was a bill in chancery by Quinn against Guthrie, Lewis, and others, in which the plaintiff alleged these facts; that Guthrie had purchased a horse from him for a certain sum, to be paid about two and a half months afterwards; that to secure payment Guthrie gave him a mortgage on his growing crop; that before the sale was consummated Quinn had an interview with the defendant Lewis in regard to the sale, and informed Lewis of the proposition, to which Lewis replied that 'Guthrie would be entitled to half the crop he was making, and it would be all right,' but at the same time advising Quinn to retain a lien on the horse, which was done. The bill further stated that the crop above referred to was growing on the land of Lewis, but that he did not inform Quinn that he had any claim to or interest in the crop. Guthrie afterwards absconded with the horse, and Lewis then for the first time informed Quinn that he had a claim on the crop. The plaintiff now sought to subject this to the payment of his debt by foreclosing the mortgage given by Guthrie; and the court held him entitled to the remedy.[3]

Another illustration may be added: If the maker of a note or bond, or mortgage or other contract, tell one proposing to take

[1] Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 1021.

[2] 43 Ala. 561.

[3] Mr. Justice Peters, speaking for the court, now said: 'Quinn applied to him [Lewis] for advice when he was about to sell his horse to Guthrie, and Lewis cautioned him not to sell without retaining a lien on the horse, and informed him that Guthrie would be entitled to one half the crop he was making on his (Lewis's) land, and that "it would be all right." This language could not have been reasonably construed to mean less than that the crop would be liable to aid in paying for the horse. The language was addressed to Quinn. It could not be all right to him if the cotton and corn that Guthrie was making on Lewis's lands were not liable to the payment of the amount about to be contracted for the horse. Nothing less than this would make it all right with Quinn. If Lewis then had claims against Guthrie for which the crop was liable, it was his duty to have disclosed them. If he failed to do this, he waived his right. This is the doctrine of this court as laid down in Steele *v.* Adams, 21 Ala. 534.' See also Simmons *v.* Camp, 71 Ga. 54; McAfee *v.* Fisher, 64 Cal. 246.

it, and desiring to know if there is any defence to it, that it is 'all right,' he must allow the words their full natural meaning, and will ordinarily be estopped to deny the truth of this admission (whether fraudulent or not [1]) when sued on the instrument by the person to whom it was made.[2] It would not do for the maker to say that he only meant that the signature was his. The words in their natural import mean, not merely that the instrument is genuine, but that it is a binding obligation, for the answer here must be interpreted in connection with the question. The case is much like the certification of a check, already considered.[3]

[1] Simpson *v.* Moore, 5 Lea, 372. See Lites *v.* Addison, 27 S. Car. 226, 233. But see Allen *v.* Frazer, 85 Ind. 283; Koons *v.* Davis, 84 Ind. 387, 389. Is not the maker bound to know the facts in ordinary cases? See post, p. 611, note 7. Comp. ante, p. 492, note 4.

[2] Brooks *v.* Martin, 43 Ala. 360; Wilkinson *v.* Searcy, 74 Ala. 243; Muse *v.* Dantzler, 85 Ala. 359; Weyh *v.* Boylan, 85 N. Y. 394; Smith *v.* Munroe, 84 N. Y. 354, 359; Smith *v.* Knickerbocker Ins. Co., ib. 589; Fleischmann *v.* Stern, 90 N. Y. 110; Union Sav. Inst. *v.* Wilmot, 94 N. Y. 221; Hoover *v.* Kilander, 83 Ind. 420; Plummer *v.* Farmers' Bank, 90 Ind. 386; Preston *v.* Mann, 25 Conn. 118; Feltz *v.* Walker, 49 Conn. 93; Bates *v.* Leclair, 49 Vt. 229; Hefner *v.* Dawson, 63 Ill. 403; Plant *v.* Voegelin, 80 Ala. 160; McCabe *v.* Raney, 32 Ind. 309; Vanderpool *v.* Brake, 28 Ind. 130; Rose *v.* Hurley, 39 Ind. 77. But see Jaqua *v.* Montgomery, 33 Ind. 36. Peters, J. in Brooks *v.* Martin, supra: 'There can scarcely be a reasonable doubt that the words used by Martin in answer to Brooks's inquiry about the note were calculated to mislead and deceive if they turned out to be untrue. It is difficult to conceive what would make a note "all right" that could not be collected by suit, or that would not be paid at maturity if the maker was able. This would make it all right, and nothing short of this would have that effect. Had there been a suit pending on the note between Brooks and Martin, and the latter had come into court and pleaded that the note was "all right," the court could not have refrained from giving judgment against him. Now, by his words he puts in this plea before suit is brought, and the law will not permit him to withdraw it after suit is brought. These words amount to an admission that Martin cannot take back without inflicting an injury upon Brooks who had acted upon it.' But if a defence arise subsequently to the representation, the maker may set it up. Cloud *v.* Whiting, 38 Ala. 57; Maury *v.* Coleman, 24 Ala. 381; Koons *v.* Davis, 84 Ind. 387, 390; Plummer *v.* Farmers' Bank, 90 Ind. 386. So if the statement is made to one who has already taken the note, no estoppel is created. Crossan *v.* May, 68 Ind. 242. And it has been intimated that one may not be estopped to deny the genuineness of a signature to a note purporting to be his own, by merely declaring the note to be good, unless he knew that it was not genuine. Koons *v.* Davis, 84 Ind. 387, 389. But this may be doubted, unless perhaps the note was not exhibited to him at the time, and there was an excuse for his mistake. Post, p. 611, n. 7.

[3] Ante. pp. 499 et seq. But comp. Stubbs *v.* Johnson, 127 Mass. 219, in

In like manner, however definite the representation, it cannot be enlarged or acted upon otherwise than according to its terms or natural import and clear meaning.[1] Thus, a representation of existing facts must be taken as limited to facts of that kind; it cannot be extended to events of the future.[2] So if the maker of a note, in reply to the question, from one who was about to purchase it, whether he had any defence to it, should say 'no,' or perhaps if he should say that the note was 'all right,' he would not be deemed to have affirmed his own solvency or ability to pay it in full. No question was asked leading obviously to disclosures that way.[3] Again, the whole representation must be taken together. One part, though sufficient alone to create an estoppel, cannot be separated from another part connected with it, which takes away its effect, though only by making the other part uncertain.[4]

Again, to say that the representation must be such as would naturally lead a prudent man to act upon it is also to say that it must be material. That is equally essential to the estoppel.[5] This, however, does not mean that the representation in question must have been the sole inducement to the change of position; if it were adequate to the result, — that is, if it might have governed the conduct of a prudent man, — and if it *did* influence the result, that will be enough, though other inducements operated with it.[6] And the law will not undertake, in favor of

which it is considered that the statement may be only an expression of opinion.

[1] Seymour *v.* Page, 33 Conn. 61; McAfee *v.* Fisher, 64 Cal. 246; Starry *v.* Korab, 65 Iowa, 267; Swager *v.* Lehman, 63 Wis. 399; Planters' Ins. Co. *v.* Selma Bank, 63 Ala. 585; Dunston *v.* Paterson, 2 C. B. N. S. 495; Davis *v.* Bowmar, 55 Miss. 571; Barrett *v.* Joannes, 70 Mo. 439; Murray *v.* Jones, 50 Ga. 109; Tilton *v.* Nelson, 27 Barb. 595; Adams *v.* Popham, 76 N. Y. 410.

[2] Planters' Ins. Co. *v.* Selma Bank, 63 Ala. 585; Williamson *v.* Mimms, 49 Ark. 336, 347, 348.

[3] It would doubtless be too much to say that the answer must always be interpreted by the question, for the answer may have gone much further than the question, and so have come to be a distinct and separate representation standing by itself. Or the answer may have taken a wholly new direction from the outset, and so have no relation at all to the inquiry.

[4] Irvin *v.* Nashville Ry. Co., 92 Ill. 103; Townsend Bank *v.* Todd, 47 Conn. 190, 216.

[5] Blodgett *v.* Perry, 97 Mo. 263, 273; Comp. Smith *v.* Chadwick, 20 Ch. D. 27; s. c. 9 App. Cas. 187; Slaughter *v.* Genson, 13 Wall. 379.

[6] McAleer *v.* Horsey, 35 Md. 439.

a wrongdoer, to separate the various inducements presented, and ascertain precisely how much weight was given to the representation in question.

The representation must have been a free voluntary act; and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress [1] or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon; [2] indeed, it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel, no estoppel is created.[3] But that must probably be understood of something in the way of artifice or other questionable endeavor. In Wilcox *v.* Howell, before cited, an action was brought to foreclose a mortgage executed by the defendant to one Picard, and by him assigned to the plaintiff. It was proved that the mortgage had been procured by fraud; but it also appeared that the defendant had given a certificate, which was delivered to the plaintiff with the mortgage, that the security had been given 'for a good and valid consideration to the full amount thereof, and that the same was subject to no offset or defence whatever.' It appeared, however, that this certificate had also been procured by the mortgagee by fraud, and that it was not given to induce the plaintiff to buy the mortgage or to enable the mortgagee to negotiate it; on the contrary, it was given with the understanding that he should not negotiate it. The court held the defendant entitled to deny the representation made in the certificate.

A representation may arise not only by way of concealment of part of the truth in regard to a whole fact, as we have

[1] See Cicotte *v.* Wayne, 59 Mich. 509.

[2] German Sav. Inst. *v.* Jacoby, 97 Mo. 617, 625; Gray *v.* Gray, 83 Mo. 106; Wilcox *v.* Howell, 44 N. Y. 398; s. c. 44 Barb. 396; Holden *v.* Putnam Ins. Co., 46 N. Y. 1; Calhoun *v.* Richardson, 30 Conn. 210; Coari *v.* Olsen, 91 Ill. 273; First National Bank *v.* Ricker, 71 Ill. 439; Sinnett *v.* Moles, 38 Iowa, 25; Stanford *v.* Lyon, 37 N. J. Eq. 94. In the recent case of Gray *v.* Gray, supra, a tax vote alleged to have raised an estoppel against the taxpayers had been obtained by fraudulent representations; and it was held that its validity might be disputed, though money had been expended under it. See Roe *v.* Jerome, 18 Conn. 138: Holden *v.* Putnam Ins. Co. 46 N. Y. 1.

[3] Gallagher *v.* People, 91 Ill. 582.

seen;[1] more than that, from total but *misleading*[2] silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise.[3] The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, e. g. no interest in the subject of the transaction. Indeed, silence, when resulting in an estoppel, may not improperly be said to have left something like a representation upon the mind; for the case is this: A negotiation is going on, and the mind receives the facts brought out, and receives those facts only. Hence, everything inconsistent with them, relating to the rights of others present as well as to those of the party with whom the negotiation is going on, is excluded. The effect may be considered negative, but the mind sees and may actually regard that negative; indeed, that, in large part, is the meaning of calculating the advantages of the proposal.[4]

This subject of silence, so well illustrated by the case of Pickard *v.* Sears, heretofore stated,[5] was soon after brought again before the same court.[6] The case referred to was an action of

[1] Notice the distinction between this case of concealed facts and the case of waiver. See end of this chapter.

[2] McKenzie *v.* British Linen Co., 6 App. Cas. 82; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; Brigham *v.* Fayerweather, 144 Mass. 48; Rector *v.* Board of Improvement, 50 Ark. 116; Gill *v.* Hardin, 48 Ark. 409; Vreeland *v.* Ellsworth, 71 Iowa, 347, a case going very far; O'Mulcahy *v.* Holley, 28 Minn. 31; Burdick *v.* Michael, 32 Mich. 246; Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 185; Wheeler *v.* New Brunswick R. Co., 115 U. S. 29, 36. The last case is a striking instance of the difficulty of determining when silence is misleading, — when, that is to say, there is a duty to speak. Five judges thought there was not such a duty; four thought there was. Of course there can be no duty to speak in the absence of knowledge or notice of one's rights. Frederick *v.* Missouri River R. Co., 82 Mo. 402. And the silence must not only have been of a misleading nature, — it must actually have misled. Maxwell *v.* Bay City Bridge Co., 46 Mich. 276; Canning *v.* Harlan, 50 Mich. 320. That is, like an ordinary representation, it must virtually have been acted upon. Ibid.

[3] Rector *v.* Board of Improvement, 50 Ark. 116, 128, quoting the text; Swayze *v.* Carter, 41 N. J. Eq. 231; Wheeler *v.* New Brunswick R. Co., 115 U. S. 29, 36; Griffin *v.* Nichols, 51 Mich. 575; Markland Co. *v.* Kimmel, 87 Ind. 560; Anderson *v.* Hubble, 93 Ind. 570, 573; Kingman *v.* Graham, 51 Wis. 232; Boynton *v.* Braley, 54 Vt. 92; Cady *v.* Owen, 34 Vt. 598; ante, pp. 559, 571; infra, pp. 585, 586, 596.

[4] It is only for the purpose of an estoppel that it can be said that there is a quasi representation in such a case. An action of deceit could hardly be maintained on the footing of a representation created by pure silence.

[5] Ante, p. 558.

[6] Gregg *v.* Wells, 10 Ad. & E. 90.

trover for goods, the fittings and furniture of a public house. The plaintiff being owner of the goods demised them to one Durham, who thereupon became tenant of the house to third parties under an agreement made in the plaintiff's presence, giving his landlords a lien on the goods. The landlords, however, did not know that the plaintiff was owner of the property, nor did they know of the arrangement with Durham; and nothing was said or done to apprise them of these facts. Subsequently Durham sold the fittings and furniture to the defendant without the plaintiff's knowledge, and the defendant purchased in good faith and in ignorance of the plaintiff's title, and thereupon became tenant under Durham's landlords. The court held that the action could not be maintained. Lord Denman said that the doctrine of Pickard *v.* Sears might be stated even more broadly than it was there laid down. 'A party,' said he, 'who negligently [1] or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.' [2]

A somewhat similar point to the one before Lord Denman was considered in Niven *v.* Belknap.[3] This was a bill quia timet under the following circumstances: The plaintiff Niven had applied to the defendant, Belknap, to purchase a farm, then in the possession of Belknap, and was informed by him that a third person, who held a mortgage from him (Belknap) upon the farm to nearly its value, had the disposal of the property. The defendant then went with the plaintiff to the mortgagee, and an arrangement was made between him and the plaintiff in the presence of the defendant for the absolute purchase of the

[1] Leather Manuf. Bank *v.* Morgan, supra; Morgan *v.* Railroad Co., 96 U. S. 720; Continental Bank *v.* National Bank 50 N. Y. 583; Coventry *v.* Great Eastern Ry. Co., 11 Q. B. D. 776, C. A.; Carr *v.* London Ry. Co., L. R. 10 C. P. 307; Kingman *v.* Graham, 51 Wis. 232; Trenton Banking Co. *v.* Duncan, 86 N. Y. 222; Anderson *v.* Hubble, 93 Ind. 570; post, §§ 3 and 4.

[2] Studdard *v.* Lemmond, 48 Ga. 100; Whitman *v.* Bolling, 47 Ga. 125; Janeson *v.* Janeson, 66 Ill. 259; Tucker *v.* Conwell, 67 Ill. 552; Basher *v.* Wolf, 59 Ill. 470; New Haven *v.* Fairhaven & W. R. Co., 38 Conn. 421. But the party cannot be estopped in cases of this kind unless he held the title at the time of the purchase or other act. Marquart *v.* Bradford, 43 Cal. 526.

[3] 2 Johns. 573.

farm, and the mortgagee thereupon executed a conveyance in fee to the plaintiff, who afterwards took possession as owner and made considerable improvements on the land. Subsequently the defendant, the mortgagor, made an absolute conveyance of the land to his son, who was a neighbor of the plaintiff; and the father and son were now proceeded against with a prayer that they might be compelled to discover any pretended title to the land, and required to renounce the same or be perpetually enjoined from asserting it. The bill was sustained by the Court of Errors; the court declaring that if a man has been silent when he ought in conscience to have spoken, he shall not be permitted to speak when conscience requires him to keep silent,[1] an expression often quoted.[2]

The principle has been broadly laid down by Mr. Chancellor Kent, and often repeated, in the following terms in effect: If a man knowingly, though passively, by looking on, suffer another to purchase land for valuable consideration,[3] under an erroneous impression of title, without making known his claim, he will not be permitted thereafter to exercise his legal right against such person.[4] In some states this rule, so far as it applies to

[1] The opinion of the court was delivered by Thompson, J. who observed: 'Though it does not appear positively from this testimony that Belknap took any active agency in this negotiation, yet his presence and silence are equally efficacious and binding upon him, if the complainant was thereby misled and deceived. There is an implied as well as an express assent; as where a man who has a title, and knows it, stands by and either encourages or does not forbid the purchase, he and all claiming under him shall be bound by such purchase. Fonbl. 161. It is very justly and forcibly observed by a writer on this subject (Roberts, Frauds, 130), that there is a negative fraud in imposing a false apprehension on another by silence where silence is treacherously oppressive. In equity, therefore, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.'

[2] See e. g. Guffey *v.* O'Reiley, 88 Mo. 418, 425; Nicholas *v.* Austin, 82 Va. 817, 825; Gray *v.* Crockett, 35 Kans. 66, 74; infra, note 4.

[3] It is a very different case where one is expending money on one's own land, in the sight of another who does not object. That cannot raise an estoppel in favor of the former. New York Rubber Co. *v.* Rothery, 107 N. Y. 310, 315, expending money for diverting a stream in one's own land.

[4] Wendell *v.* Van Rensselaer, 1 Johns. Ch. 344; Storrs *v.* Barker, 6 Johns. Ch. 166; Trenton Banking Co. *v.* Duncan, 86 N. Y. 222, 228; Chapman *v.* Pingree, 67 Maine, 198, 202; Casey *v.* Inloes, 1 Gill, 502; Schaidt *v.* Blank, 66 Md. 141, 148; Jowers *v.* Phelps, 33 Ark. 465, 468; Stone *v.* Tyree, 30 W. Va. 687, 702; Bradley

interests in land, is available only in equity, because of the Statute of Frauds; but in many states it is equally available at law.[1] And creditors who have been induced to give credit to a party in reliance upon his title to land on which another has a secret encumbrance, which, with knowledge of the creditors' act, he fraudulently conceals, are within the rule.[2] The principle upon which the rule rests is applied, as we have seen, to personalty, and that too in all its forms, as well as to land.[3]

v. Luce, 99 Ill. 234; Baird *v.* Jackson, 98 Ill. 78; Smith *v.* Hutchinson, 108 Ill. 662; Remsden *v.* Dyson, L. R. 1 H. L. 129, 140; Proctor *v.* Bennis, 36 Ch. D. 740, Bowen, L. J. In the last case Cotton, L. J. seems to have thought it necessary that the party to be estopped should know that the other was acting in ignorance, but the rule is not commonly so stated. He will ordinarily know that the other is acting in mistake, but can it be necessary for the other to show that fact?

See also of the rule that where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent, Morgan *v.* Railroad Co., 96 U. S. 716, 720; Michigan Panelling Co. *v.* Parsell, 38 Mich. 475, 480; Gingrass *v.* Iron Cliffs Co., 48 Mich. 413; Slocumb *v.* Chicago R. Co., 57 Iowa, 675, 683; Ross *v.* Thompson, 78 Ind. 90, 96; Young *v.* Babilon, 91 Penn. St. 280; Chapman *v.* Chapman, 59 Penn. St. 214; Nass *v.* Vanswearingen, 10 Serg. & R. 146; Epley *v.* Witherow, 7 Watts, 165; Carr *v.* Wallace, ib. 400; Lewis *v.* Alexander, 51 Texas, 578; Hall *v.* Fisher, 9 Barb. 17, 31; Parkhurst *v.* Van Courtland, 14 Johns. 15, 43; Malin *v.* Malin, 1 Wend. 625, 666; Adams *v.* Rockwell, 16 Wend. 285, 317; Otis *v.* Sill, 8 Barb. 102; Chautauque Bank *v.* White, 6 Barb. 589; Railroad Co. *v.* Dubois, 12 Wall. 47; Rubber Co. *v.* Goodyear, 9 Wall. 788; Gregg *v.* Von Phul, 1 Wall. 274.

In Chapman *v.* Chapman, 59 Penn. St. 214, Agnew, J. says: 'As to Gansamer there was no such positive act, but there was a silence so suggestive, so pregnant with ill to him, the court was justified in leaving its effect to the judgment of the jury. Silence will postpone a title when one should speak out, when knowing his own right one suffers his silence to lull to rest, instead of warning to danger; when, to use the language of the books, silence becomes a fraud. Such a silence though negative in form is operative in effect, and becomes suggestive in the seeming security it leads to. He who is led by such a silence ignorantly or innocently to rest upon his title, believing it to be secure, and to expend money and make improvements upon his property without the timely warning he should have had to dispel his illusion, will be protected by estoppel against recovery. Crest *v.* Jack, 3 Watts, 238; Keeler *v.* Vantuyle, 6 Barr, 250; Commonwealth *v.* Moltz, 10 Barr, 531; Woods *v.* Wilson, 37 Penn. St. 383; Miranville *v.* Silverthorn, 48 Penn. St. 149.' See also Lawrence *v.* Luhr, 65 Penn. St. 236; Miller's Appeal, 84 Penn. St. 391; Wagner's Appeal, 98 Penn. St. 77. A husband is not estopped to demand curtesy by having consented to his wife's devising her land. Roach *v.* White, 94 Ind. 510.

[1] See chapter 23. In regard to licenses to use land, and other cases of waiver of rights known to both parties, see chapter 20.

[2] Trenton Banking Co. *v.* Duncan, 86 N. Y. 222.

[3] One cannot be barred of the right

Further, an *admission*, by silence, of a representation made by the party claiming the estoppel may sometimes raise an estoppel. In Leather Manuf. Bank *v.* Morgan[1] the plaintiff brought suit to recover a balance alleged to be due to him on deposit account with the defendant bank, including the amount paid by the bank on certain altered checks of the plaintiff. The bank had rendered an account in the plaintiff's pass-book of deposit, and returned the same to him, charging him with payment of the altered checks. These checks had been drawn by the plaintiff, and after having been fraudulently altered had been paid by the bank. The alteration might have been discovered in time to enable the bank to take certain action had the plaintiff examined his pass-book in reasonable time after its return; if, in fact, this had not been done, it was held that he would be estopped to claim for the sums paid out on the altered checks. In such a case he would, by his negligent silence, have admitted the state of the account to be as made out by the bank.[2] But the jury had been directed by the court below, peremptorily, to bring in a verdict for the plaintiff; this was held error, and the cause was remanded with orders to submit to the jury the question of fault in the defendant and diligence on the part of the plaintiff.

A few cases in which silence has been held not to work an estoppel may now be referred to. In Owen *v.* Slatter[3] the plaintiff filed a bill to obtain an assignment of dower in certain pieces of land which had been sold under an order of the

to the period of limitation of actions by knowledge that acts of the kind here referred to are going on. Bartlett *v.* Kauder, 97 Mo. 356.

[1] 117 U. S. 96.

[2] Mr. Justice Harlan, for the court, said: 'There was evidence tending to show . . . that Cooper failed to exercise that degree of care which under all the circumstances it was his duty to do. He knew of the custom of the defendant to balance the pass-books of its depositors and return their checks as vouchers for payments; yet he did not examine his pass-book and vouchers to see whether there were any errors in the account, to his prejudice, and therefore he could give no notice of any. Of course if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself.'

[3] 26 Ala. 547.

Orphans' Court on the application of the plaintiff as administratrix, to the grantor of the defendants. The defence was that the plaintiff had made no reservation of her claim to dower at the sale, and that the defendants had purchased without notice of her claim. The plaintiff was held entitled to recover, on the ground that her conduct had not been fraudulent.[1]

In Cambridge Institution for Savings *v.* Littlefield[2] the indorsees of a promissory note brought an action against the maker, to which the defendant pleaded his discharge in bankruptcy. It appeared that before the note was transferred to the plaintiffs, one Wood applied to them for a loan of money, and that the plaintiffs at Wood's suggestion took the note and mortgage of the defendant as security, Wood guaranteeing the note. The intention at first was to take a mortgage from Wood. The defendant was present during the transaction, and did not disclose the fact that he had been discharged in bankruptcy from liability on the note. The plaintiffs now contended that the defendant was estopped to set up his discharge; but the court held the defence proper. It was, however, intimated that it might have been otherwise had this been the only security obtained.[3]

[1] Chilton, C. J. in delivering the opinion of the court, said: 'The widow's right to dower is unaffected by the sale unless indeed she bars her right by some act which in a court of equity would constitute it a fraud in her to insist upon it. The facts of the case before us do not make out such a bar. True, the widow in this case is administratrix, but the law prescribes her duties, and so long as she acts within the scope of those duties it would be singular, indeed, that she should forfeit her rights as an individual, merely by reason of her having properly complied with the requirements of the law in her fiduciary character. Such sales when made by commissioners are judicial in their character, and like sales under executions leave the widow's right to dower unaffected. The purchaser is supposed to examine the record, and to know what he is buying, and to purchase with a knowledge that the dower is yet an encumbrance upon the land. The maxim caveat emptor applies; and if the purchaser blindly bids off the land without inquiring whether the widow has relinquished her dower or consented to a sale of it, electing to take a share of the proceeds in lieu thereof, it is his folly, and he has no one to blame but himself. We are of opinion, therefore, that there was no fraud on the part of Mrs. Owen in failing to announce at the sale that the land was sold subject to her dower.' Comp. Wright *v.* De Groff, 14 Mich. 164; ante, p. 337.

[2] 6 Cush. 210.

[3] Having remarked that it was essential to such an estoppel that one party has been induced by the conduct of the other to do or forbear doing something which he would not or

In Watson *v.* Knight[1] the plaintiff brought an action of trespass against the defendant, a constable, for taking certain property of his under an execution against one Beason. To support the defence the constable offered to prove that on the day of sale Beason claimed the property as exempt from execution, in the presence of the plaintiff, who said nothing. It had been previously shown that Beason formerly owned the property, and had sold it to Knight about a month before the sale by the constable, and had given him possession before the levy. The plaintiff had given the defendant notice that the property be-

would have done, as the case might be, but for such conduct of the other party, Dewey, J. speaking for the court, said: 'The application for a loan was by Wood. It was, so far as we can perceive, a loan to be made on Wood's responsibility, accompanied by a mortgage of certain land to secure the payment. The party lending the money did not originally stipulate for Littlefield's personal liability. When Littlefield's note was offered as the basis of the mortgage, some objection was made to it, and thereupon Wood's guaranty was given, and the mortgage transferred to the plaintiffs and accepted by them. The plaintiffs thus received Wood's security and a valid mortgage of real estate, all equally valid whether Littlefield's personal liability had or had not been released by his discharge in bankruptcy. If it be said that the guaranty of Wood was not as good security as his promissory note, that objection equally exists whether the note of the defendant was valid or invalid as against the plaintiffs. The silence of the defendant at the time of making the loan to Wood did not change that part of the arrangement; and the guaranty of Wood is equally binding on him whether the defendant is or is not liable. Had the plaintiffs received the note from the defendant as their sole security, or as that upon which they substantially relied, and parted with their money on the strength of it as security, the silence of the defendant as to his discharge from all liability for the payment of it might have been strongly urged against him upon his setting up such discharge as a bar. But independently of a personal liability of the defendant the plaintiffs received a valid and valuable security for their money. The note was a good instrument for the foundation of a mortgage, and equally so whether the personal liability of the defendant to pay the note existed or not. So too the guaranty of Wood was a legal and valid contract irrespective of the personal discharge of the defendant by his discharge in bankruptcy. The case is not therefore the bald case of a party standing by and silently permitting a chose in action to which he is a party to be taken as a valid debt, and money lent thereupon; he knowing at the same time that there is a secret taint as to the same that renders it wholly worthless, and leaves the party taking it without any security for the repayment of the loan. On the contrary, the defendant might reasonably suppose that the plaintiffs relied principally upon the mortgage and the guaranty of Wood as their security for the money lent, and it has not been shown or suggested that the land mortgaged and the guaranty of Wood are not ample security for the loan.'

[1] 44 Ala. 352.

longed to him. The evidence offered was excluded by the court below, and the judgment was affirmed on appeal. The court observed that the claim of exemption set up by Beason was as much a defence of his right to sell to the plaintiff as the claim of property in himself, and did not call for contradiction. The defendant had received notice from the plaintiff of his claim, and the declaration of Beason was an additional reason why he should not sell.

In Hopper *v.* McWhorter,[1] an action of trover for the conversion of slaves, it was contended that the plaintiff, administrator of one Pratt, was estopped by reason of the following facts: After the death of Pratt the slaves were divided between the donees of the deceased, and the share to which the plaintiff was entitled was delivered to Mrs. Pratt. The plaintiff was present at the division, and made no objection to Mrs. Pratt's receiving the share allotted her; and he, having married one of the donees, received the portion allotted his wife. The court held that there was no estoppel.[2]

In an action of debt on a guardianship bond against the guardian and surety [3] it appeared that the guardian had been removed by an order of court, and that he subsequently received money as guardian. The surety, Holcomb, knew at the time that Phelps, the guardian, was about to receive the money under pretence of holding the position, but he did not interfere or give notice of the removal. It was now contended that Holcomb was estopped to deny his liability; but it was held that he was not. It did not appear, the court observed, that Holcomb did or said anything intended or calculated to deceive or mislead, or to induce any one to change his position; and the displacement of the guardian having been effected in a judicial proceeding, it could not be deemed incumbent upon the surety

[1] 18 Ala. 229.

[2] The court said: 'We can perceive none of the qualities of an estoppel in this. Mrs. Pratt, who received the slaves to which her husband's administrator was entitled, gave nothing for them. The administrator made no representations which it would be inequitable for him to disregard; nor, so far as we can see, did he say or do anything in reference to the division, but simply permitted the share, to which he, as administrator of Pratt, was entitled, to go into the possession of his widow.'

[3] Merrells *v.* Phelps, 34 Conn. 109.

to seek out the plaintiff and communicate to him a fact of which the record of the court gave notice to the world.

In Taylor *v.* Ely [1] the plaintiffs as assignees of one Withey sought to foreclose a mechanics' lien in his favor for building a house for the defendants the work on which was commenced by Withey and finished by the plaintiffs. The plaintiffs claimed a balance due of $1,500. It appeared that Withey during the negotiations for the assignment of the contract stated to the plaintiffs that this amount would be due on the completion of the work. This statement was immediately communicated to one of the defendants, who said that he did not know how the fact might be, that his brother knew more about the matter than he did, and referred the plaintiffs to him for information. One of the defendants remarked that he could not then tell how the account stood, as the books were at the store; and subsequently the defendants refused to give such information on the subject as the plaintiffs desired. The plaintiffs now proceeded to finish the house at considerable outlay; the defendants being present very frequently while the work was going on, but giving no further information concerning the state of the account with Withey, though it also appeared that the defendant supposed they were somewhat indebted to him. It was contended for the plaintiffs that the defendants were now estopped to deny their liability to them; but the court ruled otherwise.[2]

[1] 25 Conn. 250.

[2] In delivering the opinion of the court, Hinman, J. said: 'The plaintiffs' claim is founded upon the idea that the defendants' conduct in suffering the plaintiffs to go on and expend their money in completing Withey's contract under the false impression that when completed there would be enough due upon it to reimburse them for such expenditures, and would also be enough to pay them for a portion of Withey's indebtedness to them in connection with the declarations of the defendants, after they were informed that Withey had said that $1,500 would be due when the house was finished, and their refusal to give information in respect to their accounts with Withey, is tantamount to standing by and suffering an honest purchaser to expend his money in the purchase of property to which the party thus consenting to its sale has a claim of which he gives no notice; and as the defendants not only omitted to give any information on the subject when first applied to for the purpose, but subsequently expressly refused to give any, on the ground that they might be blamed by Withey, it is asked whether the express refusal to give any information is not to have the same effect that the silence of a party will have upon his rights to property, if he is standing by when it is sold to a bona fide purchaser; and whether it makes

The estoppel contended for failed again in the case of Corning *v.* Troy Iron Factory.[1] The action was brought to restrain

any difference in the case that a reason was given for such refusal. No one doubts that by refusing or neglecting to give notice of his rights to property, where it has the effect to mislead a purchaser, by inducing him to believe that no such rights exist, a party may preclude himself from afterwards asserting them. And the case, as we think, turns upon the application of this and other well-settled principles, rather than upon any difficult or doubtful principle itself. We do not assent, however, to the notion that a refusal to speak, with a reason given for it, is the same thing as silent acquiescence in what another does or says. A party cannot be misled unless something is done or omitted which has the effect to mislead him. . . . The doctrine in regard to estoppels in pais is more liberal and less entirely governed by technical rules than estoppels by deed or record. The object is to prevent fraud, not to produce it by entrapping a party; . . . and where the representation or concealment is not wilfully fraudulent, or is not attended with such gross negligence of the rights of others as to be tantamount thereto, the party ought not to be estopped. Parker *v.* Barker, 2 Met. 423; Cady *v.* Dyer, 20 Conn. 563. [See post, pp. 612, 632.] . . . We know of no principle that requires that the evidence of title should be disclosed; or that an account should be rendered where, as in this case, the interest of another may depend upon the state of the account, so long as nothing is done to mislead. It might be prejudicial to the right claimed, if the party was bound to go into details respecting it. The true question must be whether anything was intentionally, or at least by gross negligence, concealed which had the effect to mislead. Tested by these principles, we think the facts found by the committee are not sufficient to entitle the plaintiffs to relief. There is no actual fraud found against the defendants; and although certain facts and circumstances are found which might have more or less weight as links in a chain of evidence going to show fraud, yet they are in themselves of an inconclusive character, and in connection with other facts in the case are wholly insufficient to induce us to believe that the defendants intended to mislead the plaintiffs. The circumstance on which the plaintiffs' counsel appear to place the most reliance is the fact that the defendants stood by and saw the plaintiffs expend their money in the completion of the building without informing them that there would be nothing due on the contract when the house was finished. If this fact was unexplained, it might perhaps fairly be inferred from it that the defendants intended, by means of the plaintiffs' materials and labor upon the building, to reimburse themselves for their overpayments to Withey; and if such was their object, it would be a fraud which would subject them in this application. But the case finds that Withey informed the defendants that he had secured the plaintiffs for completing his agreement; and if this information was believed, and we cannot say the defendants had any reason to disbelieve it, it entirely changes the character of the defendants' acts, by showing that they, as well as the plaintiffs, were misled, and were acting under a mistaken impression induced by the unreliable statements of Withey. Besides, the defendants were not entirely silent in acquiescing in the plaintiffs' work upon the house; and we think, under the circumstances, that it can hardly be said that the plaintiffs

[1] 40 N. Y. 191.

the defendants from diverting the water of a stream running along the land of the plaintiffs, and to compel the defendants to restore the water to its natural channel. It appeared that one Defreest, under whom the plaintiffs claimed, while owning and using a water privilege on the stream in question had assented to the erection by the defendants of works and dams on land leased by him to the defendants, by which the waters of the stream were diverted, and urged the completion of the works intended for this purpose, and expressed his fear that the defendants had not the means to complete them. Defreest wished the completion of the works from an expectation that the result would be a large increase in population, which would raise the value of his land; and the claim of the defendants to the use of the water so diverted was adverse to Defreest. It was held that the plaintiffs were not estopped. The court said that the answer to the position that the plaintiffs were estopped was that the defendants were in full possession and control of the creek and land under the lease, and that during the continuance of the lease Defreest had no right to object to any use of the stream by the defendants except such as worked an injury to the reversion; and this the diversion during that period could not have done. The defendants further knew at the time that upon the expiration of the lease their right to divert the water would cease, and there was no pretence of any other right except under the lease; and the defendants were not therefore in any sense misled or deceived in regard to the right of diversion by anything done by Defreest.

In like manner, it is settled law that standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party; there is no duty to speak in such a case.[1]

in performing this work acted with the prudence and caution which most men would have exercised. They were probably more easily misled than they otherwise would have been, in the hope of obtaining payment of some portion of Withey's indebtedness to them; and so far as they acted under any such inducement it is chargeable to their own imprudence, for which obviously the defendants are not responsible.'

[1] Rector *v.* Board of Improvement, 50 Ark. 116, 128; Mason *v.* Philbrook, 70 Maine, 57; Rice *v.* Dewey, 54 Barb. 455; Mayo *v.* Cartwright, 30 Ark. 407; Sulphine *v.* Dunbar, 55 Miss. 255; Kingman *v.* Graham, 51 Wis. 232;

Thus, a patentee is not bound to warn others whom he may see buying an article which is an infringement on his patent; and this even when he urges the persons to buy his own article in preference as something better.[1] And of course there can be no duty to speak without a knowledge of the existence of one's own rights,[2] or of the action about to be taken.[3] Nor can pure silence (i. e. silence without fraud) operate as an estoppel to assert one's rights over property when the party supposed to be estopped was at the time in possession, for possession is notice.[4] If it be a case of property sold, the person assuming the right to sell should ordinarily at least have the property in hand.[5]

These and many other cases to the same effect proceed upon the ground, of course, that the silence of the party supposed to be estopped to assert his rights was no breach of duty to the person who asserted the estoppel. The latter had not in contemplation of law been misled by the former's silence. It follows that it is not enough to raise an estoppel that there was an opportunity to speak which was not embraced; there must have been an imperative duty to speak.[6] Nor is any duty generated

Knouff *v.* Thompson, 16 Penn. St. 357; Markham *v.* O'Connor, 52 Ga. 183. In the last case and in Kingman *v.* Graham it is suggested that there may be a duty to speak notwithstanding the record if the silent party were apprised of the intended action; but that view, assuming that the case is one of pure silence, is inconsistent with the cases generally.

[1] Proctor *v.* Bennis, 36 Ch. D. 740, C. A. Cotton, L. J.: 'The right of the patentee does not depend on the defendant having notice [the case shows that this means warning from the patentee] that what he is doing is an infringement. If what he is doing is in fact an infringement, his having acted bona fide and honestly will not protect him from an injunction.' The case, however, was not put by his lordship on the ground that the patentee's title was on record, but on the ground that the defendants knew of the plaintiff's patent. 'In my opinion,' said he, 'it must be taken that they did know it, but if they did not, I cannot find anything from which we ought to draw the conclusion that the plaintiff had reason to suppose that they did not.' But the last suggestion is dangerous. Can it be true that the person to be estopped must have known that the other was ignorant of the real state of things? Lord Justice Bowen put the case this way: 'There certainly was no representation made by Proctor to the effect that he would not enforce his rights or that he had got no rights as against these defendants; nor was there, in my opinion, any conduct which amounted to such a representation.'

[2] Bringard *v.* Stellwagen, 41 Mich. 54.

[3] Hays *v.* Reger, 102 Ind. 524.

[4] Scates *v.* King, 110 Ill. 456. See Bigelow, Fraud, 293.

[5] Howland *v.* Woodruff, 60 N. Y. 73 (two judges dissenting).

[6] George *v* Swafford, 75 Iowa, 491; Allen *v* Shaw, 61 N. H. 95; New York

by the mere fact that a man is aware that some one *may* act to his prejudice if the true state of things is not disclosed. To use an apt illustration of one of the judges, a man may become apprised of the fact that his name has been forged to a negotiable instrument, and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to proceed against the forger or to take any steps to protect the interests of others whose claims he may know nothing of.[1] So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it.[2] If the party is present at the time of the transaction, it *may*[3] be necessary for him to speak if speaking would probably prevent the action about to be taken;[4] if absent, his silence (or other conduct) must at least be of a nature to have an obvious and direct tendency to *cause* the omission or the step taken.[5] Only thus can a duty to speak arise.[6] Of

Rubber Co. *v.* Rothery, 107 N. Y. 310, 316; Perry *v.* Dow, 59 Vt. 61; Rector *v.* Board of Improvement, 50 Ark. 116, 128, 131, in regard to such duty in case of assessments made for the improvements to a person's property.

[1] Viele *v.* Judson, 82 N. Y. 32, Finch, J. See McKenzie *v.* British Linen Co., 6 App. Cas. 82; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; People *v.* Bank of North America, 75 N. Y. 548, 562; post, p. 633, note.

[2] Bramble *v.* Kingsbury, 39 Ark. 131, holding that knowledge by an owner of land that one is about to buy it from another does not impose upon the owner the duty of seeking out that one and advising him not to buy. See Sullivan *v.* Davis, 29 Kans. 28, holding that a land-owner is not estopped, by knowing that a lithographed map showing subdivisions of his land into blocks is in circulation, to deny the validity of such subdivisions.

Of course contact or presence of the party to be estopped is not necessary; there may still be a duty to speak. Anderson *v.* Hubble, 93 Ind. 570, 573. See McKenzie *v.* British Linen Co., 6 App. Cas. 82; post, p. 633, note.

[3] But the mere fact of being present and hearing a conversation between others may not create the duty to speak. Perry *v.* Dow, 59 Vt. 61. Nor will the mere fact that a husband, to his wife's knowledge, is dealing in articles as his own which belong to his wife, estop the wife to claim them against a purchaser who buys them innocently as the husband's property. Green *v.* Walker, 73 Wis. 548.

[4] Besides the examples already given see Watson *v.* McLaren, 19 Wend. 592, and Weyh *v.* Boylan, 85 N. Y. 394, 397, where it is held that if an assignee take a chose in action by assignment with the debtor's assent, though that be indicated merely by his standing by in silence, the debtor will be estopped to impeach the transaction.

[5] See Anderson *v.* Hubble, 93 Ind. 570.

[6] Further, concerning the duty to speak, see Woodhull *v.* Rosenthal, 61

course when the act in question is a single momentary act, such as a trespass, seeing it committed without raising an objection at the time cannot estop the injured party from suing therefor.[1]

Only *parties* and their *privies* are bound by the representation, and only those whom the representation is made to or intended to influence and their privies may take advantage of the estoppel.[2] If the act was inter alios, there can be no estoppel.[3] This is well shown by the case of Regina *v.* Ambergate Ry. Co. That was a mandamus to compel the defendants to proceed with the building of their railway. The reply was that their capital stock had not been subscribed and could not be obtained, and that they were forbidden by statute to exercise their powers in the mean time. To this the answer was made by way of estoppel that the defendants ought not to be admitted to make this defence because the company had acted under the compulsory clauses of their charter in another part of the line where an arbitration had taken place in the form prescribed by the statute. But the court observed that this was res inter alios acta, and could not operate as an estoppel between the prosecutors and the defendants.[4]

N. Y. 382; Campbell *v.* Birch, 60 N. Y. 214; Hodges *v.* Spicer, 79 N. Car. 223; Parker *v.* Banks, ib. 480; Mihills Manuf. Co. *v.* Camp, 49 Wis. 130. Cases of silence in the waiver of known rights will be considered in ch. 20. Such do not stand upon the ignorance of the party claiming the estoppel.

[1] Terre Haute R. Co. *v.* Rodel, 89 Ind. 128, 133.

[2] It will be seen that this estoppel is not mutual. The party to whom the misrepresentation was made has an estoppel; of course the other party, though bound, has nothing upon which to base an estoppel. See e. g. Shepherd *v.* May, 115 U. S. 505; Warren *v.* Spencer Water Co., 143 Mass. 9, 14.

[3] Mowatt *v.* Castle Steel Co., 34 Ch. D. 58, C. A.; Regina *v.* Ambergate Ry. Co., 1 El. & B. 372; Myers *v.* Cronk, 113 N. Y. 608; Marine Bank *v.* Fiske, 71 N. Y. 353; Monson *v.* Tripp, 81 Maine, 24, 26; Moore *v.* Boyd, 74 Cal. 167; Walker *v.* Walker, 9 Wall. 743; Caldwell *v.* Hart, 57 Miss. 596; Hopple *v.* Hipple, 33 Ohio St. 116; Sanders *v.* Robertson, 57 Ala. 465 (a suggestion only in this case); Townsend Bank *v.* Todd, 47 Conn. 190; Kinney *v.* Whiton, 44 Conn. 262; Mayenborg *v.* Haynes, 50 N. Y. 675; Morgan *v.* Spangler, 14 Ohio St. 102. The decision in Irvine *v.* Adams, 48 Wis. 468, may be doubted. The representation may of course be made to or intended for more than one person. Pence *v.* Arbuckle, 22 Minn. 417. Comp. Bigelow, Fraud, 89, 90.

[4] On similar grounds the fraudulent acts of a company in the issuance of shares of its stock cannot bind those who had already bought shares, if they had nothing to do with the fraud. Mowatt *v.* Castle Steel Co., 34 Ch. D. 58, C. A. Cotton, L. J.: 'A man cannot bind by his admission those who do not claim under him but who, before the admission, had acquired a right.'

The rule of estoppel between parties covers, of course, the misrepresentations of agents, even agents of corporations,[1] when made in the scope of their employment.[2] Where an agency really exists, the principal is estopped to deny the truth of the agent's statements, express or tacit, just as much as if he had himself made them,[3] subject to the same limitations that would prevail in that case. Thus a county[4] or a city[5] or other municipality may be estopped by conduct of its agents. But an agent or a servant is not himself estopped when acting by direction of his principal unless his own conduct was such as to estop him.[6] Nor is a principal estopped to deny the authority of an agent having limited powers by any representations of the agent, if the principal has not authorized the agent to declare the extent of his powers.[7]

The misrepresentation of a trustee in respect of the trust estate, to one having notice that it is such, will not work an estoppel upon an innocent cestui que trust. There is no case,

[1] Brooke *v.* New York R. Co., 108 Penn. St. 529 : Holden *v.* Phelps, 141 Mass. 456 ; Alabama R. Co. *v.* South Alabama R. Co., 84 Ala. 570 ; Chicago *v.* Sexton, 115 Ill. 230 ; Bank of Batavia *v.* Lake Erie R. Co., 106 N. Y. 195 ; Taylor *v.* Nashville R. Co., 86 Tenn. 228, 250.

[2] Green *v.* Lycoming Ins. Co., 91 Penn. St. 387 ; Platter *v.* Elkhart, 103 Ind. 360 ; Fouque *v.* Burgess, 71 Mo. 389 ; Security Bank *v.* National Bank, 67 N. Y. 458. Whether the state or any municipality can be estopped in pais by its officers, quære. Reid *v.* State, 74 Ind. 252. See also Sturgeon *v.* Hampton, 88 Mo. 203 ; Chope *v.* Detroit Plankroad Co., 37 Mich. 195 ; Vardier *v.* Railroad Co., 15 S. Car. 477, 483. Comp. ante, p. 341. Certainly not by their unauthorized acts. St. Louis R. Co. *v.* Belleville, 122 Ill. 376 ; Pulaski *v.* State, 42 Ark. 118 ; Attorney-Gen. *v.* Marr, 55 Mich. 445 ; State *v.* Brewer, 64 Ala. 287, citing United States *v.* Kilpatrick, 9 Wheat. 735. Further, see Rush Co. *v.* State, 103 Ind. 497, Union School Township *v.* First National Bank, 102 Ind. 494, and Moses *v.* St. Louis Dock Co., 84 Mo. 242, in regard to the acts of public officers. The mere relation of husband and wife creates no agency in the husband, and his misrepresentations concerning his wife's property, not authorized by her, create no estoppel against her. Hall *v.* Callahan, 66 Mo. 316 ; Caldwell *v.* Hart, 57 Miss. 596 ; Kirkman *v.* Bank of Greensboro, 77 N. Car. 394 ; Watson *v.* Hewitt, 45 Texas, 472 ; Taylor *v.* Riley, 37 Kans. 90 ; Green *v.* Walker, 73 Wis. 548. And a widow is not estopped by representations made in her absence by an administrator, in selling land of the intestate, that it is free from claim of dower. Coe *v.* Gerst, 105 Ill. 342.

[3] Sage *v.* McLaughlin, 34 Wis. 550.

[4] Cook *v.* Harnes, 108 Ill. 151.

[5] Sexton *v.* Chicago, 107 Ill. 323 ; Chicago *v.* Chicago R. Co., 105 Ill. 85 ; Chicago *v.* McGraw, 75 Ill. 570.

[6] St. Joseph Manuf. Co. *v.* Daggett, 84 Ill. 556.

[7] Ante, p. 502, note.

it has recently been declared from the bench, in which a trustee, having made a fraudulent representation by which he was bound, or even a fraudulent conveyance after his legal title was confirmed, he still being a trustee only, has thereby deprived of their property the persons beneficially entitled to the estate.[1]

It is held that the acts and admissions of one of several administrators, which amount to an estoppel against him, will work an estoppel against all.[2] In the case cited one of three administrators had been present at a levy by an officer and did not object to it, and afterwards encouraged the sale of the property. Subsequently the administrators brought a joint action of trespass against the officer for making the levy; and the court held that it could not be maintained. If there are several administrators, it was said, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the intestate, which is incapable of being divided; and in case of death such interest vests in the survivor without any new grant from the court. Acts done by one of several executors or administrators relating to the delivery, sale, or release of the testator's or intestate's goods, were the acts of all.[3] So it was said two of three executors or administrators might compromise a claim and release a debtor to the estate without the concurrence and contrary to the wish of the other.[4] The acts of an executor, it may be added, concerning land cannot estop the heir, though the executor be also the heir's guardian.[5]

It is laid down by some of the courts that the doctrine of estoppel in pais has no application, at common law,[6] to married women or infants.[7] A married woman, it was observed in

[1] Keate *v.* Phillips, 18 Ch. D. 560, 577, Bacon, V. C.

[2] Camp *v.* Moseley, 2 Fla. 171.

[3] Wheeler *v.* Wheeler, 9 Cowen, 34.

[4] Murray *v.* Blatchford, 1 Wend. 583.

[5] Shamleffer *v.* Peerless Mill Co., 18 Kans. 24.

[6] It is clearly otherwise under recent statutes. Tracy *v.* Lincoln, 145 Mass. 357; Ward *v.* Berkshire Ins. Co., 108 Ind. 301, 303; Gray *v.* Crockett, 35 Kans. 66, 74; Noel *v.* Kinney, 106 N. Y. 74.

[7] Lowell *v.* Daniels, 2 Gray, 161, 168; Bemis *v.* Call, 10 Allen, 512, 517; Merriam *v.* Boston R. Co., 117 Mass. 241, 244; Powell's Appeal, 98 Penn. St. 403, 413; Davidson's Appeal, 95 Penn. St. 394; Innis *v.* Templeton, ib. 262; Grim's Appeal, 105 Penn. St. 375, 385; Unfried *v.* Huberer, 63 Ind. 67, overruling Gatling *v.* Rodman, 6 Ind. 289, Scranton *v.* Stewart, 52 Ind. 68,

Lowell *v.* Daniels, could make no valid contract in relation to her estate. Her separate deed of it was absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, that she was seised in her own right, and that she had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them. Her most solemn acts done in good faith and for full consideration could not affect her interest in the estate, or that of her husband and children. The strongest possible example of this, it was said, was presented in the case of Concord Bank *v.* Bellis,[1] in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase-money, such deed of mortgage was wholly void. And a married woman could not do by acts in pais what she could not do by deed. She could not by her own act enlarge her legal capacity to convey an estate. To say that by acts in the country, by admission, by concealment, or by silence, that could be done in effect which could not be done by deed, would be practically to dispense with all the limitations the law had imposed upon the capacity of infants or married women to alienate their estates. Such was the reasoning of the court.

Parties under disability, as infants and married women, certainly are not estopped unless their conduct has been intentional and, in contemplation of law,[2] fraudulent.[3] In Schnell

and King *v.* Rea, 56 Ind. 1, 19. So in Delancey *v.* McKeen, 1 Wash. C. C. 354. But it did not appear in the last case that the feme knew the facts. See also Rannels *v.* Gerner, 80 Mo. 474; Burke *v.* Adams, ib. 504; Seeman *v.* Springate, 67 Ind. 115; Stevens *v.* Parish, 29 Ind. 260; Shumaker *v.* Johnson, 35 Ind. 33; Behler *v.* Weyburn, 59 Ind. 143; Bank of United States *v.* Lee, 13 Peters, 107; Drury *v.* Foster, 2 Wall. 24; Glidden *v.* Strupler, 52 Penn. St. 400; Morrison *v.* Wilson, 13 Cal. 494; Rangeley *v.* Spring, 21 Maine, 130.

[1] 10 Cush. 276.

[2] As to the legal meaning of the word 'fraud,' see 2 Bigelow, Law of Fraud, 3, 18. See also Galbraith *v.* Lunsford, 87 Tenn. 89.

[3] Cupp *v.* Campbell, 103 Ind. 213, 220; Behler *v.* Weyburn, 59 Ind. 143; McMorris *v.* Webb, 17 S. Car. 558, 563; Kane County *v.* Herrington, 50 Ill. 232; Schnell *v.* Chicago, 38 Ill. 382; Davidson *v.* Young, ib. 146; Rogers *v.* Higgins, 48 Ill. 211; Schwartz *v.* Saunders, 46 Ill. 18; Brown *v.* Coon, 36 Ill. 243; Miles *v.* Lingerman, 24 Ind. 385; McCoon *v.* Smith, 3 Hill, 147; Schenck *v.* Stumpf, 6 Mo. App. 381; Steed *v.* Petty, 65 Texas, 490, 496; Warren *v.* Hearne, 82 Ala. 554; Weathersbee *v.* Farrar, 97 N. Car. 106;

v. Chicago, just cited, a bill was filed to restrain the defendants from setting up their legal title to certain land. It appeared that this land had been sold to a party under whom the plaintiff claimed, by an administrator, for the purpose of raising money to educate one of the defendants, then fifteen years old, upon whom the title to the property had fallen by descent. The minor, it further appeared, had been desirous of being educated, and with her consent and that of her mother the land was offered for sale; and the purchaser before buying consulted both the mother and daughter upon their wishes, and they expressed their consent to the sale. The land was thereupon sold for what was then deemed a fair price, and the proceeds were partly applied to the education of the minor, and partly invested in other land in her name but at the sole direction of the administrator. The court held that these facts were insufficient to work an estoppel upon the infant.[1]

In a case in Indiana[2] it appeared that an infant feme covert joined with her husband in conveying her land to a railroad company, by which it was afterwards conveyed without her knowledge to the defendant. About ten years after the feme's attaining majority, being still covert, she gave notice to the defendant of her intention to avoid the deed, and commenced an action to recover possession of the land. Some slight improvements had been made upon the land after the conveyance made by her; but of this fact she was ignorant. She had resided

Towles *v.* Fisher, 77 N. Car. 437; Hodges *v.* Powell, 96 N. Car. 64. See Galbraith *v.* Lunsford, supra, rejecting the need of fraud in the sense of intent to deceive.

[1] Mr. Justice Lawrence, in delivering judgment, said: 'In the case at bar the infant made no false statement to the purchaser and perpetrated no fraud. She simply *consented* to the sale of the land by the administrator. Now, if an infant is not bound by the solemn and deliberate consent manifested by her own conveyance of her land, we do not know by what process of reasoning it can be made to appear that she is bound by her parol consent that another shall make the conveyance. The rights acquired by Newhall under a sale by the administrator with the consent of Margaret [the minor] were certainly not greater than if she had made the sale herself and at the same time given her own deed for the land. Yet such a sale and conveyance unaccompanied by false representations would have given Newhall no legal or equitable title which Margaret would not be at liberty to disaffirm. So far as the alleged equitable estoppel is based upon the consent given to the sale, the position of the appellant is clearly untenable.'

[2] Miles *v.* Lingerman, 24 Ind. 385.

within four miles of the land for two years after arriving at age, and within ten miles of it down to the time of the trial. It was held that she was not estopped to claim the land. It had been insisted, the court observed, that the deed of an infant could not be avoided in the hands of a subsequent grantee who had purchased without notice of the infancy of the original grantor. The position could only be sustained upon the doctrine of estoppel, for the grantor could convey no better title than he had; and some act must be done, or there must be some omission by the minor after reaching majority, resulting in an injury which would render the avoidance of the conveyance a fraud upon the person in possession. Such was not the present case.

This doctrine is also maintained by Glidden *v.* Strupler.[1] In that case a married woman had with her husband executed an invalid agreement to convey her real estate. She received one year's interest and a small part of the purchase-money. Possession was taken under the agreement, and improvements made with her knowledge and tacit encouragement; but no express fraud or act tending to mislead was committed.[2] And the court held that these facts did not raise an estoppel against the feme to claim the land.[3] In a recent case in the Supreme Court of the United States[4] it was held that there was no estoppel upon a married woman where she had with her husband signed an instrument meant for a mortgage of her separate estate, but with blanks left for the mortgagee's name and the amount for which it was to be given, which were afterwards filled and the instrument given by the husband to a bona fide lender of money without knowledge of the facts.

In cases of fraud separable from contract, however, whether by concealment or active conduct, the current of authority (in opposition to the doctrine in Massachusetts, above stated) is to the effect that a married woman may estop herself to deny the truth

[1] 52 Penn. St. 400. See also Rumfelt *v.* Clemens, 46 Penn. St. 455.

[2] See McMorris *v.* Webb, 17 S. Car. 558, where mere silence on the part of a married woman while her husband was selling her land was held to raise no estoppel against her.

[3] See Grim's Appeal, 105 Penn. St. 375, 385; Keen *v.* Coleman, 39 Penn. St. 299; Klein *v.* Caldwell, 91 Penn. St. 140; Wilt *v.* Welsh, 6 Watts, 9; Penrose *v.* Curren, 3 Rawle, 351.

[4] Drury *v.* Foster, 2 Wall. 24.

of her representation,[1] or of misleading silence on her part.[2] In the case first cited it appeared that a contract had been made for the erection of a building by the husband upon the land of his wife, with her knowledge and approbation. Though knowing what was going on, she did not disclose her interest, or do anything to prevent the work; and the court now held that she was estopped to set up her rights in defence of an action to enforce a mechanics' lien on the building. In Connolly *v.* Branstler[3] it appeared that the wife at a public sale of the land of her husband announced to the bidders that she would not claim dower against any person who should purchase the premises. It was now held that she was estopped to set up her claim in favor of one who had bought the land on the faith of her declaration. In Drake *v.* Glover[4] the jury had been charged that if the defendant, a feme covert, was present at a sale of her property by one assuming to act as her trustee, and assented to the sale, she was estopped to deny the trustee's au-

[1] Carpenter *v.* Carpenter, 10 C. E. Green, 194; Weathersbee *v.* Farrar, 97 N. Car. 106, 111; Towles *v.* Fisher, 77 N. Car. 437; Patterson *v.* Lawrence, 90 Ill. 174; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Schwartz *v.* Saunders, 46 Ill. 18; Anderson *v.* Armstead, 69 Ill. 452; Smith *v.* Armstrong, 24 Wis. 446; O'Dell *v.* Little, 82 Ky. 146; Heck *v.* Fisher, 78 Ky. 643; Connolly *v.* Branstler, 3 Bush, 702; Wright *v.* Arnold, 14 B. Mon. 638; Davis *v.* Tingle, 8 B. Mon. 539; Rusk *v.* Fenton, 14 Bush, 490; Davis *v.* Zimmerman, 40 Mich. 24; Levy *v.* Gray, 56 Miss. 318; Read *v.* Hall, 57 N. H. 482; Dukes *v.* Spangler, 35 Ohio St. 119, 127; Meily *v.* Butler, 26 Ohio St. 535; Fitzgerald *v.* Turner, 43 Texas, 79; Ryan *v.* Maxey, ib. 192; Flannagin *v.* Hambleton, 54 Md. 222; Hendershot *v.* Henry, 63 Iowa, 744; Cupp *v.* Campbell, 103 Ind. 213, 220; Powell's Appeal, 98 Penn. St. 403; Jones *v.* Kearney, 1 Dru. & War. 134; Vaughan *v.* Vanderstegen, 2 Drew. 363; Wright *v.* Leonard, 8 Jur. N. s. 415; In re Lush, L. R. 4 Ch. 591. In Georgia the estoppel is allowed in courts of equity. Dotterer *v.* Pike, 60 Ga. 29; Iverson *v.* Saulsbury, 65 Ga. 724. In Patterson *v.* Lawrence, supra (as in one or two other cases), a married woman was deemed estopped by her fraud even in a case of contract; and this is a legitimate result of the married women enabling acts of recent times. See also Nixon *v.* Halley, 78 Ill. 611; Reis *v.* Lawrence, 63 Cal. 129; Rosenthal *v.* Mayhugh, 33 Ohio St. 155 (where it was held that a married woman whose husband has been absent for seven years and unheard from may bind herself by estoppel in pais). In regard to representations concerning her equitable separate estate it is clear that a married woman may estop herself. Noel *v.* Kinney, 106 N. Y. 74, 78; Saratoga Bank *v.* Pruyn, 90 N. Y. 250, 255; Rannels *v.* Gerner, 80 Mo. 474. And generally under complete enabling acts. Levering *v.* Shockey, 100 Ind. 558.

[2] Smith *v.* Armstrong, 24 Wis. 446; Catherwood *v.* Watson, 65 Ind. 576; Gray *v.* Crockett, 35 Kans. 66, 74.

[3] 3 Bush, 702.

[4] 30 Ala. 382.

thority; and that if without being present she knew of the sale and did not object to it she was estopped to deny its validity. The court held the first charge correct, and the second incorrect; and it was further said that in case the sale was made by the husband the silence must be fraudulent, and not the result of marital restraint.[1] In McCullough *v.* Wilson[2] the wife joined the husband in procuring a third person to purchase an invalid mortgage of the wife's separate estate; and it was held that both parties were estopped to deny the validity of the mortgage.

It is clear that an action cannot be maintained at common law on a contract made with a married woman, for falsely representing herself to be sole at the time; the representation in such case not operating as an estoppel.[3] Nor could an action ex delicto be maintained in such a case.[4] And a similar doctrine

[1] Wilks *v.* Kilpatrick, 1 Humph. 54.

[2] 21 Penn. St. 436.

[3] Liverpool Association *v.* Fairhurst, 9 Ex. 422; Cannam *v.* Farmer, 3 Ex. 698; Wright *v.* Leonard, 11 C. B. N. S. 258; Keen *v.* Coleman, 39 Penn. St. 299; Keen *v.* Hartman, 48 Penn. St. 497; Klein *v.* Caldwell, 91 Penn. St. 140; Cupp *v.* Campbell, 103 Ind. 213, 220. And see Reis *v.* Lawrence, 63 Cal. 129. In the case first cited, where a married woman had induced the plaintiffs to loan money to her upon a false representation that she was a single woman, and to recover which she and her husband were sued upon a promissory note given by her for the amount, the court by Pollock, C. B. said: 'A feme covert is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is unquestionably responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it and parcel of the same transaction, the wife cannot be responsible and the husband sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is not a contract of any kind which a feme covert could make, whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue. Accordingly it has been held in the case cited and so much commented upon during the argument (Cooper *v.* Witham, 1 Lev. 247; s. c. 1 Sid. 375) that the wife could not be bound in such a case. It is true that Twisden, J. assigned another reason, viz. that the wife having represented herself to be sole and induced the plaintiff to marry her, it was a felony in her, and so no action could lie till the felony was tried; but it was said that if the wife had been pardoned, by which that objection was removed, yet it seemed the action would not lie, and the reason was that it sounded in contract.'

[4] Ibid.

prevails, by the weight of authority, in regard to the false representations of a minor concerning his age, though another has been induced to contract with him on the faith of them.[1] It is clear also that an infant is not estopped by receiving during minority money from the sale of his lands from afterwards laying claim to them, nor indeed by the act of his guardian in receiving the money unless acting under authority of law.[2]

Indeed, cases are not wanting in which it is declared that the doctrine of estoppel in pais has no application whatever to infants.[3] The case of Brown *v.* McCune, just cited, was, however, simply the case of an infant who had falsely represented himself to be of age, and thereby obtained the goods for which the suit was brought. It was of course held that the action could not be sustained; it sounded in contract. In Ackley *v.* Dygert[4] it appeared that no one had been influenced by the representations of the infant; and the case is therefore not an authority for the statement made in it that an infant can do no act which will work an estoppel upon him. The next case referred to[5] is hardly an authority either for so broad a proposition; for there the court observed that the facts upon which the estoppel of the infant was based had not been proved. In Norris *v.* Wait,[6] which is a direct authority against the estoppel, the court admits that if an infant be guilty of a fraud and be proceeded against ex delicto, he will be answerable.[7]

The authorities, on the other hand, are not few or obscure

[1] Johnson *v.* Pye, 1 Sid. 258; s. c. 1 Keb. 913; Bartlett *v.* Wells, 1 Best & S. 836; Baker *v.* Stone, 136 Mass. 405 (silence of infant); Merriam *v.* Cunningham, 11 Cush. 40; Alvey *v.* Reed, 114 Ind. 148; Buchanan *v.* Hubbard, 96 Ind. 1; Carpenter *v.* Carpenter, 45 Ind. 142; Price *v.* Jennings, 62 Ind. 111; Wieland *v.* Kobick, 110 Ill. 16; Burley *v.* Russell, 10 N. H. 184, explaining Fitts *v.* Hall, 9 N. H. 441; Conrad *v.* Lane, 26 Minn. 389. But see Kilgore *v.* Jordan, 17 Tex. 341; Schnell *v.* Chicago, 38 Ill. 382, dictum.

[2] Gillespie *v.* Nabors, 59 Ala. 441.

[3] Brown *v.* McCune, 5 Sandf. 224; Ackley *v.* Dygert, 33 Barb. 176, 193; Lackman *v.* Wood, 25 Cal. 147, 153; Norris *v.* Wait, 2 Rich. 148. See McCoon *v.* Smith, 3 Hill, 147; Montgomery *v.* Gordon, 51 Ala. 377 (in the absence of fraud); McBeth *v.* Trabue, 69 Mo. 642; Ferguson *v.* Bobo, 54 Miss. 121; Shivers *v.* Simmons, 54 Miss. 520; Upshaw *v.* Gibson, 53 Miss. 341; Sims *v.* Everhardt, 102 U. S. 300. See Campbell *v.* Laclede Gas Co., 84 Mo. 352, 368.

[4] 33 Barb. 176.

[5] Lackman *v.* Wood, 25 Cal. 147.

[6] 2 Rich. 148.

[7] Wood *v.* Vance, 1 Nott & McC. 197.

which maintain the proposition that if an infant of years of discretion knowing that he has a right to an estate encourage a purchaser to buy it of another without asserting any claim to it, the purchaser will hold it against the infant.[1] It appears to be the better doctrine with these authorities that both infants (of years of discretion) and married women *may* be estopped to set up a claim to their property against a purchaser. Both are liable when properly sued for their torts in an action which does not seek the enforcement of a contract or demand damages for repudiating, or for fraudulently inducing the plaintiff to make, a contract; and in an action for a fraudulent representation of title whereby the plaintiff has been induced to expend money for the purchase of property belonging in reality to the defendant the measure of damages must of course be the sum paid. Now, to prevent a circuity of action (which indeed is the ground of many estoppels, if not also of this very class of equitable estoppels) it is but right on analogy that the infant or feme should be rebutted when proceeding to regain possession. Certainly this would seem proper when the party so proceeding has no other property with which to answer the purchaser for the deceit. We do not say that the existence of an estoppel by conduct always depends upon the existence of a right of action for deceit; but we apprehend that while there may be an estoppel without this right of action in some cases,[2] the estoppel always arises where the action of deceit would be maintainable.

[1] Sugden, Vendors, 743, 14th Eng. ed.; Overton *v.* Banister, 3 Hare, 503; Esron *v.* Nicholas, 1 De G. & S. 118; Hall *v.* Timmons, 2 Rich. Eq. 120; Whittington *v.* Wright, 9 Ga. 23; Irwin *v.* Merrill, Dud. 72; Thompson *v.* Simpson, 2 Jones & L. 110; Brantley *v.* Wolf, 60 Miss. 420, 431; Ferguson *v.* Bobo, 54 Miss. 121; Barham *v.* Tuberville, 1 Swan, 437; Galbraith *v.* Lunsford, 87 Tenn. 89, modifying Barham *v.* Tuberville, and holding intent to deceive to be unnecessary; on which, see 1 Bigelow, Law of Fraud, 538; 2 ib. 116. See also Stokeman *v.* Dawson, 1 De G. & S. 90; Wright *v.* Snow, 2 De G. & S. 321; Unity Joint Stock Assoc. *v.* King, 3 De G. & J. 63; Telegraph Co. *v.* Davenport, 97 U. S. 369; Goodman *v.* Winter, 64 Ala. 410; Merritt *v.* Horne, 5 Ohio St. 307; Commonwealth *v.* Sherman, 18 Penn. St. 343, 346. The cases in chancery, it will be noticed, are more strongly in favor of the estoppel than those at law.

[2] See Pickard *v.* Sears, 6 Ad. & E. 469; Gregg *v.* Wells, 10 Ad. & E. 90; Niven *v.* Belknap, 2 Johns. 578. Cases of mere silence would not according to high authority furnish ground for an action of deceit. Peek *v.* Gurney, L. R. 6 H. L. 377.

It is not satisfactory to say that what an infant cannot directly do he cannot do indirectly. So long as that merely means that if an infant cannot bind himself by an express contract for the sale of his property, he cannot bind himself by any kind of contract, it is perfectly true; but in the case put contract with the infant, express or other, is out of the question. The only contract is with another, to wit, the person assuming to act as vendor. The situation of the infant is that of one committing fraud, not of one making a contract, at least not necessarily of one making a contract. If there be a valid agency in *fact* (a rare thing in the case of an infant), then there is a contract through the vendor with the infant as principal; but it is taking liberty with the truth to say that there must be a legal agency in the mere act of the infant permitting the sale.[1] An infant's conduct may result in what could not be done by any express attempt on the part of the infant to do by contract. He may, for example, commit a battery, and find his property levied upon and sold in consequence; and there is good sense in saying that an infant who in express fraud (without an agency in fact) permits another to sell his property as the property of the vendor should be equally accountable for his misconduct. If this is so, the simplest way to effect the object is to estop the infant from setting up his title to the property.[2]

That the doctrine of *privity* prevails here was determined in Wood *v.* Seely.[3] In this case one Shoemaker, under whom the

[1] To talk of the existence of an agency and of conveying title in such cases is unnecessary to the fixing upon the infant an estoppel. Estoppel to assert title arises independently of agency and of transfer of title, if it be not inconsistent with them. The infant does not lose his title in the sense of having conveyed it away; he is only barred from asserting it. A purchaser from him without notice would probably get a good title. Comp. what has been said as to estoppel by deed, ante, pp. 413 et seq. See infra, p. 609. However, it is held, that a married woman may authorize her husband to convey her real estate. Griffin *v.* Rusdell, 71 Ind. 440; Lichtenberger *v.* Graham, 50 Ind. 288. That being true, there can be no good reason why she should not be able to estop herself by fraud.

[2] An infant is not permitted in equity to enjoy the proceeds of a sale of his property, and then repudiate the sale as irregular or void, any more than an adult. Goodman *v.* Winter, 64 Ala. 410, 437; Commonwealth *v.* Sherman, 18 Penn. St. 346. And this whether the sale is by act of the infant or by authority of law. Ibid.

[3] 32 N. Y. 105. See also Wortham *v.* Gurley, 75 Ala. 356; Mookerjee *v.* Deb, L. R. 9 Ind. App. 147.

plaintiff claimed, had been induced by the defendant to purchase and pay the full value of certain land upon a representation that the defendant had no interest in the land. It was now contended on behalf of the latter in support of a claim of interest in the land that the estoppel was personal, and that Shoemaker alone could avail himself of it; but the court held otherwise.[1]

The doctrine is illustrated also in Parker *v.* Crittenden.[2] In this case the plaintiff bought a hack in the possession of a third person, as belonging to him. The real owner was present, and assented to the sale. Subsequently it was attached as his in the hands of the plaintiff, who now brought replevin. The court held him entitled to recover. The defendants, it was remarked, by claiming through the owner under the attachment, were privies in estate with him and bound by the same estoppel.

An illustration of estoppel by privity may also perhaps be seen in the case of Kinnear *v.* Mackey.[3] In this case an officer was induced to make a levy upon and sale of a tenant's interest in a leasehold as free from all rights and claims of the landlord upon representations of the landlord that it was thus free. It was decided that the purchaser was entitled to the benefit of the estoppel as privy of the sheriff.[4]

[1] Denio, C. J. in delivering judgment, said: 'I am of opinion, on the contrary, that the plaintiff, or the owner of the land under Shoemaker's title, holding under mesne conveyances from him, is equally entitled to avail himself of the equitable bar. In some of the cases referred to relief was given to the grantee of the party defrauded. Such was the case of Town *v.* Needham, 3 Paige, 545. In Jones *v.* Powell, 6 Johns. Ch. 194, where a right of dower was relieved against on the ground that a collateral compensation had been made by the testamentary trustees of the husband, the party to whom the relief was adjudged was a grantee of the immediate purchaser. Estoppels by record and by deed, as is well known, run in favor of and against the privies in estate of the immediate parties to the estoppel as well as for and against the parties personally; and I see no reason why estoppels in pais should not be within the rule as they clearly are within its principle. Cases of dedication often rest upon the principle of estoppels in pais; it being considered fraudulent on the part of one dedicating his land to public uses to retract, to the prejudice of parties who have purchased on the faith of such dedication. It has frequently been held that the estoppel attaches itself to the land, and can be asserted on behalf of the grantee of the immediate purchaser.' Hills *v.* Miller, 3 Paige, 254; Watertown *v.* Cowen, 4 Paige, 510; Child *v.* Chappell, 9 N. Y. 246.

[2] 37 Conn. 148. Also in International Bank *v.* Bowen, 80 Ill. 541.

[3] 85 Ill. 96.

[4] Perhaps it would have been quite as accurate to say that the representa-

By analogy to the position heretofore taken concerning the relation of grantor and grantee in conveyances of real estate it would seem that a purchaser of goods is not a privy in estate or otherwise with his vendor so as to be affected by an estoppel in pais resting on the vendor in respect of the goods. Thus, if a person stand by and allow his goods to be sold as the goods of another to one who does not take possession, and the actual owner afterwards sell the same to another person for value and without notice of the previous transaction, the latter would be entitled to the goods against the first purchaser. The owner would simply be precluded from setting up title against the purchaser. It is not the office of an estoppel to *pass* a title. The title remains, but it cannot be asserted against the party who acted upon the false representation. With reference to others it may be asserted or conveyed; and a purchaser not being a privy would not be estopped to assert title to the goods. This is certainly true of a purchaser under an execution against the real owner.[1]

§ 3. *Knowledge of Facts by him against whom the Estoppel is alleged.*[2]

Estoppel arising in virtue of a misrepresentation is the converse of an action of deceit. The property or interest claimed by reason of the estoppel corresponds to the damages sought in the action of deceit; and in order to make good the claim of estoppel, the same things, it should seem, are requisite that are

tion was virtually intended for the purchaser; he takes from the owner, not from the sheriff.

[1] Richards *v.* Johnston, 4 Hurl. & N. 660; Bigelow's L. C. Torts, 438.

[2] In previous editions the subject of knowledge of the facts in all its phases, whether in regard to the party against whom the estoppel is alleged, or against the party alleging it, or in regard to the intention of the party alleging the estoppel, has been treated in this section; but that has been thought to lead to confusion (Lowell, Transfer of Stock, p. 126, note 3), and a change is now made. The present section treats only of knowledge of the falsity of the representation in the party to be estopped; § 4 treats of the same subject in relation to the opposite party; and § 5 includes all that bears upon knowledge in the party to be estopped in regard to the intention of the other party, actual knowledge and presumptive. Note to the 4th ed.

One cannot be barred of the right to allege the Statute of Limitations by knowledge of the facts and long inaction. Bartlett *v.* Kapder, 97 Mo. 356.

necessary to the maintenance of the action mentioned.[1] Now by the clear weight of authority, in which courts of equity, in recent times at least, agree with the courts of law, it is necessary to the recovery of damages in an action for misrepresentation, by the current of authority, to show that the defendant made the representation (1) with actual knowledge of its falsity, or (2) recklessly, without knowing whether it was true or false, or (3) under circumstances in which, from his peculiar relation to the facts, he was bound to know the true state of things.[2]

Taking these three phases of the scienter from the action of deceit, and transferring them to the subject of estoppel, attention for the present need be drawn particularly only to the third. The first of the three — actual knowledge of the falsity of the representation — is of course a perfectly clear and unquestioned case for an estoppel; for there is the 'scienter' pure and simple. And the same will be seen to be true, upon reflection, of the second; to make a positive statement of fact is virtually to assert that one has knowledge upon which to base it, and this is to assert what one knows to be false if the assertion is made without knowledge whether it is true or false.[3]

The third of the phases of the scienter (where the represen-

[1] Freeman *v.* Cooke, 2 Ex. 654; Swan *v.* North British Co., 7 Hurl. & N. 603, Martin, B.; s. c. in error, 2 Hurl. & C. 175; Bank of Ireland *v.* Evans' Charities, 5 H. L. Cas. 389, Parke, B.; ante, p. 570, note 3.

[2] Among many other cases consult the following: Derry *v.* Peek, 14 App. Cas., 337, rev'g 37 Ch. D. 541; Joliffe *v.* Baker, 11 Q. B. D. 255; Arkwright *v.* Newbold, 17 Ch. D. 301, 320; Reese Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64; Redgrave *v.* Hurd, 20 Ch. D. 1; Mahurin *v.* Harding, 28 N. H. 128; Case *v.* Boughton, 11 Wend. 106, 108; Evertson *v.* Miles, 6 Johns. 138; Carley *v.* Wilkins, 6 Barb. 557; Bennett *v.* Judson, 21 N. Y. 138; Lobdell *v.* Baker, 1 Met. 193, 201; 1 Story's Eq. p. 209, 13th ed., note by the present writer, where the subject is worked out in detail. Some courts dispense with proof of knowledge in any form.

Can it be necessary to an estoppel, under the law of the scienter, that the party to be estopped should also know that the other party is acting in ignorance? So it appears to have been supposed by Lord Justice Cotton in Proctor *v.* Bennis, 36 Ch. D. 740, 760, citing Ramsden *v.* Dyson, L. R. 1 H. L. 129, 140. But it may be doubted whether the passage quoted means that any such knowledge is necessary. An auctioneer makes a false representation scienter; must a buyer show that the auctioneer knew that the buyer was ignorant of the facts?

[3] Evans *v.* Edmonds, 13 C. B. 777, 786; Phelps *v.* White, 7 L. R. Ir. 160, 170; Morse *v.* Dearborn, 109 Mass. 593, 595; Twitchell *v.* Bridge, 42 Vt. 68; Beebe *v.* Knapp, 28 Mich. 53; Stone *v.* Covell, 29 Mich. 359; Preston *v.* Mann, 25 Conn. 118.

tation, though believed to be true by the party who made it, was made under circumstances showing that he ought to have known that it was false), though sufficient in regard to knowledge,[1] is more difficult to handle; for the circumstances which should fix knowledge must be peculiar, special, and strong, and may be influenced towards strengthening or taking away the grounds of the estoppel in many ways. Generally speaking, it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge.[2] More definitely, the rule has been thus stated: What a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man, paying that attention which every man owes to his neighbor in making a representation, would have acquired in the particular case by the use of such means.[3] That is perhaps as definite as any general proposition covering the subject can be made. In accordance with it, or something like it, directors of a corporation are held to be bound to know the proceedings of the body in ordinary cases.[4] The general proposition may also probably be deemed sufficient to cover cases of implied warranties, e. g. the certification of checks and the like cases considered in the chapter on Commercial Paper,[5] and also in sales;[6] for these too seem to rest upon the ground of presumed knowledge in the warrantor.[7]

[1] See Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; Weinstein *v.* National Bank, 69 Texas, 38; Harlow *v.* Marquette R. Co., 41 Mich. 336; Payment *v.* Church, 38 Mich. 776; Coleman *v.* Pearce, 26 Minn. 123; Madison Co. *v.* Paxton, 57 Miss. 701; Mutual Ins. Co. *v.* Norris, 31 N. J. Eq. 583, 585; Davenport R. Co. *v.* Davenport Gas Co., 43 Iowa, 301; Wright *v.* Newton, 130 Mass. 552; Stone *v.* Great Western Oil Co., 41 Ill. 85; Greene *v.* Smith, 57 Vt. 268; Louks *v.* Kenniston, 50 Vt. 116.

[2] Jarrett *v.* Kennedy, 6 C. B. 319, 322; Doyle *v.* Hort, 4 L. R. Ir. Ex. D. 661, 670; Morse *v.* Dearborn, 109 Mass. 593; Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; Stone *v.* Great Western Oil Co., 41 Ill. 85; Simpson *v.* Moore, 5 Lea, 372; McIntire *v.* Yates, 104 Ill. 49; Hillock *v.* Traders' Ins. Co., 54 Mich. 531.

[3] Palles, C. B. in Doyle *v.* Hort, 4 L. R. Ir. Ex. D. 661, 670.

[4] Stone *v.* Great Western Oil Co., 41 Ill. 85.

[5] Ante, p. 499.

[6] See McIntire *v.* Yates, 104 Ill. 49.

[7] Price *v.* Neal, 3 Burr. 1354; ante, p. 481; 1 Story's Equity, pp. 210, 390, notes, 13th ed. It would seem to cover ordinary cases of attempts to set up defences to notes and other contracts which the maker has represented to be

Again, the question often arises whether negligence in general, touching the matter of knowledge, can supply the requirement of the rule of knowledge. Of *knowledge*, we say, for it is to be noticed that questions of the effect of negligence may arise in other relations of estoppel by conduct,[1] as in regard to the party's intention that his representation shall be acted upon,[2] and in regard to the injury to be sustained by acting upon it.[3] But in regard to the connection of negligence with a party's knowledge, it is not quite clear whether negligence, apart from such cases as knowledge implied by reason of the special relation of the party to the facts, will take the place of knowledge. It has been suggested by a learned judge that where the alleged ignorance involves gross culpability, there should be a limit to the facility with which a party, whose words or conduct have misled another to the latter's injury, should be permitted to qualify his responsibility by pleading his own fault.[4] But the learned judge did not undertake to define the principle, contenting himself with saying that, 'suitably restricted, the principle of which we have given an intimation unquestionably exists.'[5] It should be added that cases of this kind should not be confused with the question of estoppel by negligence where there is no communication between the parties. As has been intimated already, that is a very different matter.[6]

A few cases touching negligence in regard to knowledge of facts misrepresented will serve to throw some light upon this

good to one purchasing in reliance thereon. See Simpson *v.* Moore, 5 Lea, 372. But see Allen *v.* Frazer, 85 Ind. 283; Koons *v.* Davis, 84 Ind. 387, 389.

[1] To speak of a representation as made 'negligently' is not a commendable use of language. The meaning is not clear; 'negligently' in what respect is the question, — in regard to knowledge of the facts, in regard to the effect of the representation upon the mind, in regard to the person who may act upon it, or in what regard? The question is often important.

[2] Tracy *v.* Lincoln, 145 Mass. 357.

[3] See post, pp. 630 et seq.

[4] Storrs, J. in Preston *v.* Mann, 25 Conn. 118, 129.

[5] Whitaker *v.* Williams, 20 Conn. 98, 104, was referred to. See also Slim *v.* Croucher, 1 De G. F. & J. 518; s. c. 2 Giff. 37; Coventry *v.* Great Eastern Ry. Co., 11 Q. B. D. 776, C. A.; Vagliano *v.* Bank of England, 23 Q. B. D. 243, 249, Lord Esher; Boynton *v.* Braley, 54 Vt. 92; Sutton *v.* Wood, 27 Minn. 362; Barstow *v.* Savage Mining Co., 64 Cal. 388; Anderson *v.* Hubble, 93 Ind. 570; 1 Story's Equity, p. 390, note, 13th ed.; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; post, p. 631, note.

[6] See next chapter.

obscure subject. In a case[1] in the English Court of Chancery it appeared that one Hudson, a builder, having finished several houses at Bromley, applied to the plaintiff's solicitors to know if any client of theirs would lend him money on a mortgage of the houses, informing them that the defendant Croucher, to whom the land belonged on which the houses had been erected, had agreed to grant him (Hudson) a lease of it for ninety-eight years and a half. The solicitors having read the agreement for a lease shown them by Hudson, required an assurance from Croucher that he would grant a lease according to the agreement. Under these circumstances Hudson applied to Croucher and informed him of the matter, and Croucher thereupon wrote and sent by Hudson a letter to the solicitors in which he said that he was 'quite agreeable' to grant the lease. The plaintiff then by his solicitors proceeded to prepare the same, and having done so notified Croucher and Hudson and requested them to call and examine it. They did so and approved of it in writing. The lease was afterwards engrossed, and a counterpart executed, which was handed over to Croucher, the solicitors retaining the lease on behalf of the plaintiff. The plaintiff now loaned Hudson various sums of money on the faith of the security, and Hudson executed an instrument purporting to be a mortgage, by way of underlease of the houses. Hudson subsequently became embarrassed and went abroad; and the plaintiff shortly afterwards discovered that prior to all these transactions Croucher had granted a lease to Hudson for ninety-nine years, which had included all the premises comprised in the plaintiff's security, and that this lease had been assigned by Hudson for value to a stranger and was still subsisting. Croucher thus had no right to grant the second lease, and the mortgage was worthless. The plaintiff now filed a bill against Croucher and Hudson charging fraud, misrepresentation, and concealment, and praying that Croucher might be ordered to repay to the plaintiff the sums loaned, with interest. Croucher denied the charges of fraud, misrepresentation, and concealment, and stated in defence to the suit that at the time of granting the lease comprised in the plaintiff's security he had forgotten the grant to Hudson of

[1] Slim v. Croucher, 1 De G. F. & J. 518; s. c. 2 Giff. 37.

the prior lease, and had in consequence inadvertently granted the second lease. The court held the plaintiff entitled to recover from Croucher, affirming the decree of the Vice-Chancellor on the ground that his forgetfulness was inexcusable.[1]

[1] 2 Giff. 37. The Lord Chancellor said: 'There has been a misrepresentation; and if there had been moral fraud in the case, it could hardly have been disputed that a court of equity would have had jurisdiction to inquire into it and to call upon the defendant to disclose all that he knew, and give relief from the consequences of the fraud. Now, although there may not be moral fraud here, yet I think that the party who has been injured has a right to relief. Mr. Lewis, in a very able argument, has cited a number of cases (Sainsbury *v.* Jones, 5 Mylne & C. 1; Denton *v.* Stewart, 1 Cox, 258; Greenaway *v.* Adams, 12 Ves. 395; Todd *v.* Gee, 17 Ves. 273, and other cases), in which he says that a contrary doctrine has been laid down in this court, but he has not cited one single case similar to this, where it is held that equity will not give relief. I think that his authorities may be divided into two classes, — one where there was only a general claim to damages which a court of equity at that time could not have properly assessed; and the other class where there was a breach of promise, not the misrepresentation of a fact. But here there is the misrepresentation of a fact, and there is no difficulty at all in assessing the amount of the loss, and in doing justice between the parties. I cannot distinguish this case from the case of Burrowes *v.* Lock, 10 Ves. 470. There the defendant is called a trustee because he was a trustee, but the word is used merely to designate the person who took a part in the transaction. There was no fiduciary relation between the plaintiff and the trustee who made the misrepresentation. They were strangers to each other, just as much as the plaintiff and the defendant are in this case; but the trustees stated and stated innocently, just as much as the defendant in this case, what was untrue; and it was held that he was liable to make good the loss that had arisen from his misrepresentation. I believe that every word which Sir William Grant uses in that case is applicable to this. "It is objected," he says, "that this is a demand for damages; also that this was not a wilful misrepresentation. As to the first point the demand is properly made in equity; and the Lord Chancellor, in Evans *v.* Bicknell, 6 Ves. 174, declared that the case of Pasley *v.* Freeman, 3 T. R. 51, and all others of that class, were more fit for a court of equity than a court of law; but his lordship was clearly of opinion that at least there is a concurrent jurisdiction, and says: 'It has occurred to me that that case upon the principles of many decisions in this court might have been maintained here; for it is a very old head of equity that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.'" That is, you may undo the transaction, and you may replace the person to whom the representation is made as far as possible in the same situation in which he was before the representation was made. Lord Eldon certainly does say, "if he knows it to be false." But the meaning of that qualification of the proposition is, as I understand the words, if he makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment that he made the representation he had forgotten it.' It so happens that in the case of Burrowes *v.* Lock, supra, the person who made the representation set up the same

In the late case of Coventry *v.* Great Eastern Ry. Co.[1] the defendants had negligently issued two delivery orders, at different times, in respect of the same consignment, but in such a way as to indicate that they related to different consignments. On both orders the party to whom they were given obtained advances from the plaintiffs. That party became insolvent, and suit was now brought to recover from the defendants the amount of such advances; and the suit was upheld.[2]

Forgetfulness was allowed as a defence in the case of an infant in the Court of Appeals of New York.[3] In this case the parents of the defendant, Henrietta Carr, an infant, conveyed to her the premises in controversy. Ten or eleven years afterwards the parents executed a deed of the same premises to the plaintiff in trust. The plaintiff advanced large sums of money on this security, paying also an outstanding mortgage upon the land. Henrietta, then about sixteen years of age, signed her mother's name to the deed at her mother's request. She had forgotten at the time the conveyance to herself; but after the plaintiff had made all his advances she recollected the deed. The action was

defence as is now done by Mr. Croucher. The Lord Chancellor now quotes again the language of Sir William Grant in the case above cited: 'In this case the plaintiff was going to deal with Cartwright upon a matter of interest, and applied to the person best qualified to give information, the trustee, to know what Cartwright was entitled to; who told the plaintiff expressly that Cartwright was entitled to £288, and had an undoubted right to make an assignment to that extent, knowing that he had not a right to make such an assignment, having previously agreed to give another person £10 per cent out of the fund. There is, therefore, a concurrence of all the circumstances which the Lord Chancellor (Lord Eldon in Evans *v.* Bicknell, 6 Ves. 174) thinks requisite to raise the equity. The excuse alleged by the trustee is that though he had received information of the facts he did not at that time recollect it. But what can the plaintiff do to make out a case of this kind but show, first, that the fact as represented is false; secondly, that the person making the representation had a knowledge of a fact contrary to it?' The Lord Chancellor says that he does not find that this case has ever been questioned, and that he regards it as sound. Slim *v.* Croucher has lately been followed in Iowa and in Missouri. See Bullis *v.* Noble, 36 Iowa, 518, 521; Raley *v.* Williams, 73 Mo. 310. And see the language of Deady, J. in Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464, 469, intimating that a person should inform himself in regard to facts he once knew, but which by lapse of time or other circumstances have become dim and confused in his mind.

[1] 11 Q. B. D. 776, C. A.

[2] See also Seton *v.* Lafone, 19 Q. B. D. 68, C. A., affirming 18 Q. B. D. 139; post, chapter 19. But see Second National Bank *v.* Walbridge, 19 Ohio St. 419.

[3] Spencer *v.* Carr, 45 N. Y. 406.

brought to bar Henrietta's claim, or to have the land sold and the plaintiff's advances repaid; but the defendant prevailed.

Before turning to illustrations of the subject of knowledge proper it is well to advert to a supposed difference between courts of equity and courts of law in regard to the question of knowledge. It has been suggested, and occasionally affirmed, that courts of equity do not insist upon knowledge as a condition to the estoppel as strongly as do courts of law;[1] but this, it is apprehended, is a clear mistake, at least so far as the recognized authorities are concerned. Misrepresentation is, it is true, a well-recognized ground in equity for the rescission of contracts, or for injunction, though the representation was made in the belief that it was true; but innocent misrepresentation is admitted at law also as a defence in contract.[2] Again, courts of equity are in accord with courts of law in regard to suits for damages on account of misrepresentation. Courts of equity of the highest authority have spoken clearly in regard to the action of deceit, declaring that to enable a man to recover *damages* he must establish the scienter in one of the three senses above stated;[3] and the property, as has already been observed, which the party claiming the benefit of the estoppel seeks to hold represents the damage, or rather he keeps the property as answering to the result of a suit for damages. Indeed, when the more recent cases in equity come to be examined, it will be found that there are very few decisions, not affected by special facts, which favor any great difference between the rules at law and in equity upon the subject;[4] the supposed difference being traceable

[1] 2 Pomeroy, Equity, §§ 803, 809. See Strosser *v.* Fort Wayne, 100 Ind. 443, 447.

[2] See 1 Bigelow, Fraud, 410, 412.

[3] Supra, p. 610, and cases there cited. But there is reason to regret that want of reasonable grounds of belief should not be enough, in deceit and in estoppel.

[4] See Newbigging *v.* Adam, 34 Ch. D. 582, 592, Bowen, L. J.

Even the rule in equity that a contract may be rescinded or a suit upon it resisted or enjoined if it was founded upon misrepresentation, though innocent, is consistent with the rule concerning the scienter in deceit, as has been shown in recent cases of high authority. For though the representation may have been innocent when made, and not a ground of action for damages, it becomes a fraud in the party making it to insist upon its performance after notice has been brought to him of its falsity; now at all events he is affected with knowledge, and the scienter is made out, for the purposes of the recission, the defence or the injunction. Arkwright *v.*

probably to the prominence of the rule of rescission in equity for innocent misrepresentation. At all events, courts of equity have not as yet professed to depart from the rule of courts of law in regard to the matter of knowledge in estoppels by misrepresentation.

Aside, then, from cases falling under one of the three phases of knowledge above mentioned, and the possible case of a man's attempting to take advantage of an innocent misrepresentation of his after notice of its falsity,[1] it will in all courts be fatal to the supposed estoppel claimed that the representation was made in ignorance, under mistake;[2] sometimes even though this

Newbold, 17 Ch. D. 301, 320, C. A.; Redgrave *v.* Hurd, 20 Ch. D. 1, C. A.; 1 Story's Equity, p. 210, note, 13th ed. That is, the party cannot make a benefit out of his own (now) wrongful act. The case would be the same if it were a question of estoppel against the party. There, in the same way, is the scienter. This will explain such cases as Hendricks *v.* Kelly, 64 Ala. 388, 391, and Prickett *v.* Sibert, 75 Ala. 315, 319. But the case of benefit sought to be enforced by the party to be estopped is not the ordinary case of estoppel by conduct; in the typical case the party to be estopped has *lost* a benefit or right which he had before the transaction; he is not seeking to gain something under and by virtue of the transaction in question. See e. g. Pickard *v.* Sears. Hence it is not a fraud for him now to say that he did not know (and was not bound to know) the facts — whether at law or in equity.

The courts of some of the states, however, have gone a long way towards eliminating, and perhaps have eliminated, the scienter altogether. See Putnam *v.* Tyler, 117 Penn. St. 570, 586; Miller's Appeal, 84 Penn. St. 391; Woodward *v.* Tudor, 81* Penn. St. 382; Paul *v.* Squibb, 2 Jones, 290; Commonwealth *v.* Moltz, 13 Serg. & R. 306; Beaupland *v.* McKeen, 4 Casey, 131; Rice *v.* Bunce, 49 Mo. 231; Hart *v.* Giles, 67 Mo. 175; St. Louis R. Co. *v.* Larned, 103 Ill. 293; Hendricks *v.* Kelly, 64 Ala. 388, 391; Prickett *v.* Sibert, 75 Ala. 315, 319. But it will be found in most of the cases that the language, however broad, as in the last two cases, has been used of situations above considered; to wit, (1) where the party *assumed* to know what he did not know, or (2) where he was bound to know the facts, or (3) where he is endeavoring to enforce a contract or other demand after knowledge brought home to him, before or in the suit, that the same was founded upon a false though at the time innocent representation. All such cases fall within the rule of the scienter.

Still, it must be admitted that the law in some of the states dispenses altogether with the need of proving any scienter in actions for deceit; and hence proof of any scienter would be unnecessary to the estoppel. Putnam *v.* Tyler, 117 Penn. St. 570, 586.

[1] The case would then be that referred to in the note supra.

[2] For various illustrations see Blake Crusher Co. *v.* New Haven, 46 Conn. 473; Clinton *v.* Haddam, 50 Conn. 84; Gray *v.* Agnew, 95 Ill. 315; Follansbee *v.* Parker, 70 Ill. 11; Marion Road Co. *v.* McClure, 66 Ind. 468; Van Horn *v.* Overman, 75 Iowa, 421; Decorah Mill Co. *v.* Greer, 49 Iowa, 490; Hager *v.* Burlington, 42 Iowa, 661; Cannon *v.* Home Ins. Co., 53 Wis. 585, 597; Taylor *v.* Nashville R. Co., 86 Tenn. 228, 245; Boynton *v.* Braley, 54 Vt. 92;

mistake be one of law, as in regard to property exempt from taxation.[1]

The subject may be illustrated by cases relating to mistake in the supposed settlement of boundaries between estates. In the case of Liverpool Wharf *v.* Prescott[2] the plaintiffs brought a writ of entry to recover a narrow strip of land in Boston. It appeared that a line had been agreed upon between the plaintiffs and the defendants about twenty years before the commencement of the action, and had been mutually adopted as the correct one and built upon accordingly with the acquiescence of the demandants, until some time in the years 1858 or 1860, when they claimed that the defendants' building was over their line, and notified them in writing, but made no other interruption of the defendants' possession. In the court below the defendants asked the court to instruct the jury that if they found that the line of the building had been adopted as the true line with knowledge or with reason to believe that they were going to erect a building upon it and make expensive outlays, and that the defendants did then with the knowledge of the demandants adopt the line thus given, and relying upon it proceeded at once to make the erections and outlays contemplated, the demandants seeing and knowing it and standing by without making any objection or giving notice, they would now be bound by that line and estopped to deny that it was the true boundary. But the court declined to give this instruction, and told the jury that the facts were not sufficient to estop the demandants; and the judgment was affirmed on appeal.[3] The

Acton *v.* Dooley, 74 Mo. 63; Burke *v.* Adams, 80 Mo. 504; Chicago Ry. Co. *v.* Auditor-Gen., 53 Mich. 79; Van Ness *v.* Hadsell, 54 Mich. 560; Buck *v.* Milford, 90 Ind. 291, 293; Pitcher *v.* Dove, 99 Ind. 175; Tillotson *v.* Mitchell, 111 Ill. 518; Bull *v.* Rowe, 13 S. Car. 355; Douglass *v.* Craig, ib. 371; Wright *v.* Newton, 130 Mass. 552; Breeze *v.* Brooks, 71 Cal. 169, 182.

[1] Charlestown *v.* County Commissioners, 109 Mass. 270. See Chicago Ry. Co. *v.* Auditor-Gen., 53 Mich. 79, where an assessment was based upon the party's own public report. It was held that it could be shown that the report was made in mistake. See also Van Ness *v.* Hadsell, 54 Mich. 560.

[2] 7 Allen, 494; s. c. 4 Allen, 22.

[3] Mr. Justice Hoar now said: 'We are of opinion that it was rightly held at the trial that there is no estoppel under such circumstances. There is nothing in the case to show that there was any "standing by" and permitting the expenses to be incurred without notice, which was the case put in Thayer *v.* Bacon, 3 Allen, 163. The parties did not even undertake to fix a doubtful line by agreement, but only to

case was one of pure mistake, without knowledge of the true boundary.[1]

In another case[2] it appeared that certain parties, intending to establish the true line between their lands, agreed upon a boundary by parol, which was not in fact the true line. But they held possession in accordance with the conventional line; and one of the parties being about to sell to the defendants, the other stated to the purchasers that the line agreed upon was correct, and that he did not claim beyond it. After the sale the purchasers made improvements next to the conventional line with the knowledge of the adjoining owner, who was often present and repeatedly pointed out the line, without giving notice of any claim to the land. Having subsequently discovered the true line, and that it extended beyond the improvements, the court held him entitled to recover it.[3]

The principle upon which these cases proceed is that there must have been, when the incorrect line was acted upon, knowledge of the true boundary by the one party and ignorance of it by the other, in order to estop the party from asserting it within

point the true boundary as fixed by the deed. The authority of Tolman *v.* Sparhawk, 5 Met. 469, is therefore direct and decisive. The case relied on by the tenants (Kellogg *v.* Smith, 7 Cush. 375) is wholly different. There the line in question had been referred to as a fixed boundary and adopted as such for more than a hundred years; and the decision did not rest on the point of estoppel.'

[1] Proctor *v.* Putnam Machine Co., 137 Mass. 159; Schraeder Mining Co. *v.* Packer, 129 U. S. 688; Perkins *v.* Gay, 3 Serg. & R. 327, 331.

[2] Brewer *v.* Boston & W. R. Co., 5 Met. 478.

[3] 'We must,' said Wilde, J. in delivering judgment, 'consider the declarations and admissions of the demandant as having been made in good faith and by mere mistake. And admissions thus made do not, we think, by law operate by way of an estoppel. . . . Now, it does not expressly appear by the case stated that the declarations of the demandant were made to the tenants' agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. Nor does it appear that the tenants will be injured by the flats; for if they purchased with warranty, they may be indemnified. We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly under a mistake and that he has made no declaration contrary to his honest belief at the time or with any intention to deceive the tenants. And we think it clear that declarations thus made do not operate in the nature of an estoppel. A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake without fraud or intentional deception although another party may be induced thereby to purchase an adjoining lot the title to which may prove defective, for he may require a warranty, and it would be most unjust that a party should forfeit his estate by a mere mistake.'

the period of limitation; and this though it may have been intended that the incorrect line should be fixed upon as the true one and acted on accordingly.[1] This is true, it is held, though the admission was in writing, provided the instrument did not operate as a conveyance.[2] And the doctrine of estoppel by standing by and permitting one's property to be sold, or of witnessing a deed to it made by another, supposes the like state of facts.[3] But it would probably be admitted everywhere that a verbal agreement fully acted upon with knowledge would create an estoppel to dispute the bounds fixed upon.[4]

In many of the states, however, long acquiescence is accepted as a substitute for knowledge of the facts at the outset;[5] and it is accordingly held of such cases that an estoppel *may* arise in

[1] Illustrations are numerous. See Ramsden *v.* Dyson, L. R. 1 H. L. 129, 140; Sheridan *v.* Barrett, 4 L. R. Ir. 223; Perkins *v.* Gay, 3 Serg. & R. 327, 331; Schraeder Mining Co. *v.* Packer, 129 U. S. 688, 699; Hass *v.* Plautz, 56 Wis. 105, 111; Gove *v.* White, 20 Wis. 425; s. c. 23 Wis. 282; Corkhill *v.* Landers, 44 Barb. 218; Laverty *v.* Moore, 32 Barb. 347; s. c. 33 N. Y. 658; Raynor *v.* Timerson, 51 Barb. 517; Smith *v.* McNamara, 4 Lans. 169; Reed *v.* McCourt, 41 N. Y. 435; Reed *v.* Farr, 35 N. Y. 113; Rutherford *v.* Tracy, 48 Mo. 325; Lemmon *v.* Hartsook, 80 Mo. 13; Acton *v.* Dooley, 74 Mo. 63; Kirchner *v.* Miller, 39 N. J. Eq. 355; McKelway *v.* Armour, 2 Stockt. 115; Pitcher *v.* Dove, 99 Ind. 175; Davenport *v.* Tarpin, 43 Cal. 598; People *v.* Plumpke, 41 Cal. 263; Kincaid *v.* Donnell, 51 Mo. 552; Evans *v.* Miller, 58 Miss. 120. In Halloran *v.* Whitcomb, 43 Vt. 306, 312, and again in Louks *v.* Kenniston, 50 Vt. 116, the court quotes the following language from Hicks *v.* Cram, 17 Vt. 449: 'If one man has made a representation which he expects another may or will act upon, and the other does in fact act upon it, he is estopped to deny the truth of the representation.' But if by this it was intended to lay down an accurate formula (which was probably not the case), it certainly is defective in omitting the element of knowledge in the party against whom the estoppel is claimed. The same is to be said of Hughes *v.* Wheeler, 76 Cal. 230. The cases are exceptional and rest on peculiar grounds where this element may be dispensed with. See Greene *v.* Smith, 57 Vt. 268; Louks *v.* Kenniston, 50 Vt. 116; cases of boundaries in which it was considered that the party estopped ought to have known where the line was.

[2] Bradbury *v.* Cony, 59 Maine, 494.

[3] Brown *v.* Tucker, 47 Ga. 485; Hale *v.* Skinner, 117 Mass. 474; Greene *v.* Smith, 57 Vt. 268. The mere fact that during a controversy about boundaries one of the parties located a fence on the supposed line will not estop him to say that it was not on the line. Noble *v.* Chrisman, 88 Ill. 186.

[4] Keer *v.* Hitt, 75 Ill. 51, 60; Bauer *v.* Gottmanhausen, 65 Ill. 499; and the Massachusetts cases, supra. In Wisconsin the estoppel can only arise where there is an uncertainty in fact in regard to the boundary at the time; and if the true line can be made out by a survey, or by the calls and monuments of the deed, the boundary is certain. Hartung *v.* Witte, 59 Wis. 285; Hass *v.* Plautz, 56 Wis. 105, 111.

[5] See ante, p. 457.

cases even of mistake after lapse of time, in connection with a change of situation.[1] In McCormick *v.* Barnum acquiescence for twenty-two years was held sufficient. In Chicago Ry. Co. *v.* People acquiescence for nineteen years was deemed enough. In Adams *v.* Rockwell it was suggested that in case valuable improvements had been made in accordance with the supposed boundary, acquiescence for eleven years might be sufficient. In Hagey *v.* Detweiler the period of acquiescence was fifteen years, and that was held long enough. And the same period was in Columbet *v.* Pacheco held to raise an estoppel to dispute the assumed boundary. So far as this doctrine disregards entirely the question of the knowledge, presumptive as well as actual,[2] of the party against whom the estoppel is claimed, it is not in accord with the general principles of equitable estoppels. But whatever the better rule in cases of acquiescence, the party acting upon the representation, if innocent, should not in any case be deprived of the improvements made by him, where compelled to give up the land.[3]

Under either doctrine, and whether there be knowledge or not of the true state of the title to the land in question, the estoppel applies only to rights existing in the party at the time of the representation or admission; and he will not be precluded from setting up a paramount title afterwards acquired from a third person.[4] The estoppel is not like that which arises under a conveyance with warranty. And the estoppel in any case

[1] McCormick *v.* Barnum, 10 Wend. 104; Chicago Ry. Co. *v.* People, 91 Ill. 251; Diehl *v.* Zanger, 39 Mich. 601; Stewart *v.* Carleton, 31 Mich. 270; Adams *v.* Rockwell, 16 Wend. 285, 302; Perkins *v.* Gay, 3 Serg. & R. 327; Hagey *v.* Detweiler, 35 Penn. St. 409; Sneed *v.* Osborn, 25 Cal. 619; Columbet *v.* Pacheco, 48 Cal. 395; Joyce *v.* Williams, 27 Mich. 332; Acton *v.* Dooley, 74 Mo. 63; Dolde *v.* Vodicka, 49 Mo. 98; Major *v.* Rice, 57 Mo. 384; Thomas *v.* Pullis, 56 Mo. 211; State *v.* Wertzel, 62 Wis. 184; Strosser *v.* Fort Wayne, 100 Ind. 443, 447 (knowledge presumed); Brackenridge *v.* Howth, 64 Texas, 190. See Bazemore *v.* Freeman, 58 Ga. 276; Greene *v.* Smith, 57 Vt. 268. And concerning mistake in an arbitration to settle boundaries, see Davis *v.* Henry, 121 Mass. 150.

[2] Long acquiescence may well make knowledge a presumption of law in some cases. See Strosser *v.* Fort Wayne, 100 Ind. 443, 447.

[3] Dolde *v.* Vodicka, 49 Mo. 98. See however, Stockman *v.* Riverside Co., 64 Cal. 57.

[4] McLain *v.* Buliner, 49 Ark. 218, 225, quoting the text; Donaldson *v.* Hibner, 55 Mo. 492; Dillett *v.* Kemble, 10 C. E. Green, 66.

arises only where there has been an honest agreement actual or implied for the settlement of the boundary.[1] Mere survey had by adjoining owners works no estoppel, unless the surveyor or some one acting upon his report were an arbitrator;[2] though it is held that the grantee of lands who himself has had them surveyed and the lines marked will be estopped by his own survey.[3] Nor will the mere joining of the adjacent owners in building a division fence establish the boundary conclusively, though followed by occupation for several years.[4]

Many other cases might be adduced in illustration of the rule under consideration; a few may be added from widely different relations. Some courts, in a class of cases already considered, of warehouse receipts and bills of lading, have gone a doubtful length. In a recent case in Ohio[5] it appeared that the defendant, a warehouseman, had given two receipts by mistake for the same grain. The second receipt came into the plaintiff's hands bona fide and for value after the grain had been delivered on the first receipt. In an action for the non-delivery of the grain on the second receipt the court allowed the defendant to show that it had been given by mistake.[6] But this, while not without support,[7] is contrary to many other authorities.[8] If

[1] Spring *v.* Hewston, 52 Cal. 442; Chapman *v.* Crooks, 41 Mich. 595. See also Cronin *v.* Gore, 38 Mich. 381; Smith *v.* Hamilton, 20 Mich. 433; Joyce *v.* Williams, 26 Mich. 332; Stewart *v.* Carleton, 31 Mich. 270; Bobo *v.* Richmond, 25 Ohio St. 115. It is said, however, that agreement may be shown by long acquiescence as well as by express contract; and the decisions in regard to acquiescence are not, it seems, in conflict with the proposition of the text. Betts *v.* Brown, 3 Mo. App. 20; Lindell *v.* McLaughlin, 30 Mo. 28. It may be added in explanation of the objection of the Statute of Frauds in such cases that the agreement is not deemed to amount to conveyance, but only to the fixing of limits to what has already been conveyed. Betts *v.* Brown, supra; Houston *v.* Matthews, 1 Yerg. 118; Bobo *v.* Richmond, 25 Ohio St. 115.

[2] Spring *v.* Hewston, 52 Cal. 442.

[3] Singleton *v.* Whiteside, 5 Yerg. 36; Caruthers *v.* Crockett, 7 Lea, 91, 96. The same case decides that the grantor will also be estopped by agreeing to such survey, assuming that the grantee has conformed reasonably to the calls of the grant. And if the grantor has made no objection, it seems that the survey is to be taken to be in reasonable conformity to the calls, against subsequent owners. Caruthers *v.* Crockett, 7 Lea, 91, 96.

[4] Chapman *v.* Crooks, supra.

[5] Second National Bank *v.* Walbridge, 19 Ohio St. 419.

[6] See also Blanchet *v.* Powell's Co., L. R. 9 Ex. 74; Ferguson *v.* Northern Bank, 14 Bush, 555; ante, p. 475.

[7] Williams *v.* Wilmington R. Co., 93 N. C. 42; Solomon *v.* Bushnell, 11 Oreg. 277.

[8] Coventry *v.* Great Eastern Ry. Co.,

from the nature or situation of the property the case were such that the party making the admission might not be bound to know the facts, it might be right to hold that there was no estoppel.[1]

In the case of the Bank of Hindustan *v.* Alison[2] the question was whether the defendant had by his conduct estopped himself from denying that he was a shareholder in the Bank of Hindustan. It appeared that two banking companies, the Bank of Hindustan and the Imperial Bank of China, had agreed to amalgamate, the business of the latter company to be transferred to the former, and the shareholders having the option to take newly created shares in the Bank of Hindustan. The last-named bank issued circulars informing the shareholders of the other bank of the arrangement, and intimating the option to take new shares in the Bank of Hindustan. The defendant thereupon applied for and obtained an allotment of twenty-five shares, paid a portion of the sum due, and engaged to pay the residue. Several calls were afterwards made of which the defendant had notice, and he never repudiated his liability until the present action was brought against him for the non-payment of the calls. The amalgamation was declared void by a decree in chancery in 1868; but the plaintiff bank contended that the defendant was estopped by his conduct to deny that he had become a shareholder of the bank. The court decided in favor of the defendant on the ground that when he made application for the shares he was ignorant of the condition of the bank.[3]

11 Q. B. D. 776, C. A.; ante, p. 615; Armour *v.* Michigan Central R. Co., 65 N. Y. 111, and other cases, ante, p. 475.

[1] See Hale *v.* Milwaukee Dock Co., 29 Wis. 482.

[2] L. R. 6 C. P. 54.

[3] In respect to the authorities cited in support of the estoppel Bovill, C. J. said: 'The strongest for the purpose were the cases of Hull Flax and Cotton Mill Co. *v.* Wellesley, 6 Hurl. & N. 38, and Sewell's Case, L. R. 3 Ch. 131. In the former the court held that the defendant was estopped from denying that he was a shareholder, first, because he had executed the deed of settlement which authorized the creation of the shares, and secondly, because he had for five years constantly received a dividend on the shares which he held. Under these circumstances, having bound himself by his execution of the deed and having accepted a benefit, it was properly held that he had estopped himself from denying that he was a holder of valid shares. That, therefore, is a very different case from the present. In the case of Re New Zealand Banking Corporation, Sewell's Case [supra], the directors of a company whose capital was £300,000, divided into 3,000 shares of £100 each,

The case of Calhoun *v.* Richardson was trover by the trustee in insolvency of an insurance company for certain bonds in the

made an unauthorized issue of 1,000 additional shares beyond their capital. They afterwards called general meetings at which resolutions were passed to increase the capital to £600,000, to be divided into 60,000 shares of £10 each; and it was held that the issue of the 1,000 shares, although originally ultra vires, was confirmed by the resolutions, and that the allotters of those shares were bound by the resolutions and were rightly placed on the list of contributories in the winding up of the company. The ground upon which the decision proceeded was that Mr. Sewell and the other shareholders were parties to the resolutions ratifying what had been done. I find nothing of the kind in the present case. There was another case referred to at the conclusion of the argument, namely, Re London and Northern Insurance Co., Stace and Worth's Case, L. R. 4 Ch. 682, which strongly confirms this view. It is true the circumstances of the two cases are not precisely similar; for there was no application for shares there, as there was here. Two of the directors under an attempted amalgamation which turned out not to be valid had attended meetings and acted as if they were shareholders. The court held that, the amalgamation being void and there being no separate agreement by the defendants to become shareholders independently of the amalgamation, there was nothing to fix them with liability as shareholders.' The Chief Justice then said that it was clear from the circumstances of the case that what had been done was the result of mistake, and that the plaintiffs had not been misled by the defendant. Mr. Justice Willes forcibly stated these points. 'Has the defendant . . . chosen,' said he, 'to become a shareholder in the bank of Hindustan? I may at once dispose of that question by saying that he has not so chosen, because his application for the shares was made not only without a knowledge of the facts, with such an ignorance of the facts on his part as would constitute an entire mistake as to the subject-matter of the contract, but with either a corresponding ignorance on the part of the plaintiffs or with a knowledge that the circumstances were otherwise than their directors represented in the circular to which I have already drawn attention. I will assume that there was no fraud. The other alternative is that both parties were mistaken as to that about which they were contracting; that the plaintiffs honestly meant to sell shares to which was annexed a certain privilege to be obtained by means of money advanced by the Imperial Bank of China; and that the defendant was satisfied to take shares with that privilege. It now appears that he cannot have shares with that privilege. He is therefore not bound by his contract, and the money advanced by the Imperial Bank of China must be restored to them. Another sort of estoppel is sought to be raised by reason of the plaintiffs having been induced by the conduct of the defendant to alter their position. When challenged to show how the plaintiffs had altered their position in consequence of the defendant's conduct, Mr. Brown said the bank might upon the faith of the defendant and others having become shareholders have entered into large engagements which they would not otherwise have entered into. I find nothing in the special case to lead me in point of fact to that conclusion; and if it were so, it would be necessary to show that the plaintiffs had been led to adopt such a course by the conduct of the defendant. I think it might be said more justly that the plaintiffs are the wolf and the defendant the lamb. It was the plaintiffs who led the defendant into the

possession of the defendant. It appeared that the defendant, who had been a director and the principal stockholder in the company, signed a certificate to an affidavit of the president of the company in which certificate it was declared that all the statements made in the affidavit were true so far as the defendant had knowledge. In the affidavit it was declared that the bonds in question were part of the property of the company. It appeared also that the defendant had shortly before signed a receipt which was held by the company, in which he had acknowledged that the bonds belonged to the insurance company; and the plaintiff claimed that this receipt had been given to enable the company to make their report to the comptroller of the state. It was also proved that soon after the receipt was given a return was made to the comptroller and published according to law, publication being made in the town in which the defendant resided; and in this return the bonds were also stated to be the property of the company. The court held that evidence was proper to show that the certificate had been given under a misrepresentation of the contents of the affidavit, and with no knowledge that it stated that the bonds belonged to the company; that the defendant might show that to prevent injury he had given information as soon as the facts were discovered; that he might show that he was unable to read writing, and that the receipt had been obtained by fraud;[1] and that he might

mistake of supposing that he had valid shares in their bank. It was they who held out to him the inducement to become a shareholder. It was they who muddied the sources of information by intimating to the defendant that he might get shares on the advantageous terms they represented.' The case was now carried to the Exchequer Chamber, where the judgment of the Common Pleas was affirmed. L. R. 6 C. P. 222. Kelly, C. B. speaking for the court, now said: 'A party is only estopped from showing the truth when he has by some act or declaration acquiesced in an assumed state of things, and by such acquiescence the situation of the other party has been altered to his prejudice. For example, where the directors of a company have been guilty of some irregularity in the issuing of shares, and with knowledge of the irregularity a party has agreed to become a shareholder, or after having been made acquainted with the irregularity has received dividends or done some other act to express his acquiescence in what has been done, so that the situation of the directors has been altered to their prejudice, they have a right to treat him as a shareholder, and he is estopped from setting up the irregularity by way of defence.'

[1] See Wilcox *v.* Howell, 44 N. Y. 398. Further, ante, p. 583.

show that he had in fact no knowledge of the statement in the return concerning the bonds. But the court suggests that the case would have been different had the defendant been guilty of misconduct or gross negligence.[1]

§ 4. *Ignorance of Facts by him who claims the Estoppel.*

The person, further, who claims the benefit of this estoppel must show that he was ignorant of the truth in regard to the representation; and he must have been permissibly ignorant thereof.[2] He may, like the party against whom the estoppel is

[1] Upon this last point Mr. Justice Ellsworth, speaking for the court, said: 'Now the plaintiff insisted that as the defendant was a director of the company at that time [when the return was made], as well as before and after, and regularly attended the directors' meetings, he must be held to have known the contents of this annual return, and to have assented to it as exhibiting the true situation and condition of the company's assets, and that under all the circumstances of the case the defendant was guilty of fraudulent misconduct or gross negligence in permitting the return, if it was false, to be made and published, and the company to transact business on the credit of it. . . . This claim as presenting a principle of law we think unobjectionable, and so we presume the judge himself considered it; for he proceeded to instruct the jury as to the nature and effect of an estoppel, and correctly enough told them that to estop the defendant his action must have been understandingly and intelligently had, and his admissions understandingly and intelligently made, which is well enough as to the point of knowledge; but the judge says nothing about the effect of fraudulent conduct and gross negligence as estopping the defendant and subjecting him to damages. We think the defendant might have been unacquainted with the contents of the return to the comptroller, and yet possibly be liable on the ground claimed by the plaintiff. The plaintiff insisted that the defendant ought to have informed himself, and not to have given his sanction, either directly or indirectly, to the return, and afterwards set up a claim directly against it. We do not mean to say as matter of law that the defendant did sanction the return or is liable under the circumstances, but it was quite proper that the jury should pass upon the question whether the defendant had been guilty of misconduct or gross negligence so that he should not be allowed to shield himself upon the plea of ignorance. It is the summing up in the charge of the court to which we most object as to the effect of gross negligence when there is not actual knowledge. . . . We forbear to say what degree of neglect and inattention in the directors and officers of incorporated companies, in the duties for which they are appointed and which they are understood to engage to perform to some reasonable extent towards the stockholders and the confiding public, will subject them to damages. This is a delicate point to settle, and not likely to be correctly determined upon the common notions which seem to prevail too generally among certain classes in the community.'

[2] Steel *v.* Smelting Co., 106 U. S. 447; Fitzpatrick *v.* Flannegan, ib. 648; Shipley *v.* Fox, 69 Md. 572, 579.

alleged, have been so situated as to be bound to know the facts and apart from the making of the representation he will be subject to the same sort of presumptions which we have seen applicable to the opposite party.[1] If he knew or under all the circumstances ought to have known the facts, the estoppel, even if the representation was made on oath, falls to the ground.[2] But the situation of the party to whom the representation is made is not wholly like that of the one who makes it; for the very representation may well have put him off his guard and prevented him from availing himself of sources of information open to him. And it is well settled that a clear and positive representation of fact may be acted upon, though the person to whom it was made had ample means of knowing the fact,[3] — indeed, though he had legal notice thereof, as distinguished from knowledge, as e. g. by the due registration of an instrument.[4]

One or two illustrations of the foregoing rule will now be given. In a suit upon a promissory note given for the purchase of certain stock, in which suit it appeared that the defendant purchased the stock from the president of the company, who

[1] As where, in the *absence* of any representation, the parties stand in the same relation towards the fact. Bales *v.* Perry, 51 Mo. 449; Kingman *v.* Graham, 51 Wis. 232; Knouff *v.* Thompson, 16 Penn. St. 357, 364. E. g. in regard to a recorded deed of land, or in regard to possession. Shipley *v.* Fox, 69 Md. 572; Scates *v.* King, 110 Ill. 456; ante, p. 575.

[2] Smith *v.* Kremer, 71 Ill. 185; Dorlargue *v.* Cress, ib.; Robbins *v.* Potter, 98 Mass. 532; s. c. 11 Allen, 588; Buck *v.* Milford, 90 Ind. 291, 293; Logansport *v.* La Rose, 99 Ind. 117, 131; Mayer *v.* Ramsey, 46 Texas, 371; Shillock *v.* Gilbert, 23 Minn. 373; Plummer *v.* Mold, 22 Minn. 15; St. Louis *v.* St. Louis Gas Co., 5 Mo. App. 484; s. c. 70 Mo. 69; Phinney *v.* Johnson, 13 S. Car. 25; Kingman *v.* Graham, 51 Wis. 232; Brant *v.* Virginia Coal Co., 93 U. S. 326; Andrews *v.* Redfield, 98 U. S. 225. In the case of a *deed* a recital known by both parties to be untrue will, in the absence of fraud, create an estoppel. Blackburn *v.* Bell, 91 Ill. 434. Probably the same would be true of a parol statement agreed upon by the parties as ground of a contract. See Stewart *v.* Metcalf, 68 Ill. 109; ante, pp. 331, 459.

[3] Dodge *v.* Pope, 93 Ind. 480; Campbell *v.* Frankem, 65 Ind. 591; Redgrave *v.* Hurd, 20 Ch. D. 1, 13; David *v.* Park, 103 Mass. 501; Keller *v.* Equitable Ins. Co., 28 Ind. 170; Parham *v.* Randolph, 4 How. (Miss.) 435; Kiefer *v.* Rogers, 19 Minn. 32; Holland *v.* Anderson, 38 Mo. 55; Wannell *v.* Kem, 57 Mo. 478; Mead *v.* Bunn, 32 N. Y. 275, 280; Webster *v.* Bailey, 31 Mich. 36; 1 Story, Equity, p. 215, 13th ed., note.

[4] David *v.* Park, 103 Mass. 501; Evans *v.* Forstall, 58 Miss. 30; Sulphine *v.* Dunbar, 55 Miss. 255; Parham *v.* Randolph, 4 How. (Miss.) 435; Kiefer *v.* Rogers, 19 Minn. 32; Holland *v.* Anderson, 38 Mo. 55.

represented that it was at par and that the business was of great value and that the corporation was solvent, all of which was false, it was held that though the defendant had ample opportunity, before his purchase, of learning the true state of affairs, he had a right to presume that the vendor was fully informed upon the subject and to rely upon his statements.[1]

In a case in Ohio[2] the plaintiffs sought to recover of 'Adams & Co.' a sum of money placed in their hands for investment but which they had not invested. The answer was filed, not by Adams & Co. but by another firm, consisting mainly of the same individuals, calling themselves 'Adams & Co.'s Western Express.' It appeared that there were in fact two express companies composed largely of the same members, having a branch office in the place, kept by a common agent. One of these companies was the original firm of Adams & Co.; the other was the one which answered to the suit. The name of the latter company alone was upon the sign of the branch office; but its business was transacted as well in the name of Adams & Co., and Adams & Co.'s Express, as in its own proper name. The defendants were held liable; the plaintiff's ignorance of the facts being deemed excusable.[3]

§ 5. *The Intention.*

The next requirement to this estoppel is that the representation must have been made with the intention, either actual or

[1] Wannell v. Kem, 57 Mo. 478.

[2] Adams v. Brown, 16 Ohio St. 75.

[3] 'Had Miss Pollock,' said the court, referring to one of the plaintiffs, 'known the distinctive business of these two companies, or had her ignorance been the result of her own fault or folly' — but that seems rather too strong — 'or free from fault on the part of defendants, the case would have been different. But such were not the facts. In her eyes both companies were one and the same. To her understanding the name of one was the name of each, and the business of either was that of both. If this was a misunderstanding, it was a misunderstanding induced by the acts of the defendants, and probably shared in by the public generally. The companies being composed in part of the same individuals, each is presumed to be cognizant of the business and name of the other. If the new company did not intend to deceive and mislead the public, such was at least the effect of their acts. They cannot act in the name of one company and do the business of that company, and then fall back upon the rights and immunities of the other.'

reasonably to be inferred[1] by the person to whom it was made, that it should be acted upon.[2] In general, where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration made is true so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth.[3] Thus, in Kuhl *v.* Jersey City it was held that a receipt for taxes on land given by a tax-collector on receiving a check would not estop him from showing that the check was not paid,

[1] For illustrations other than those of the text see Tracy *v.* Lincoln, 145 Mass. 357; Kinney *v.* Whiton, 44 Conn. 262, 269; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96, 108; Freeman *v.* Cooke, 2 Ex. 654; Carr *v.* London Ry. Co., L. R. 10 C. P. 307; Arnold *v.* Cheque Bank, 1 C. P. D. 578; Smith *v.* Hughes, L. R. 6 Q. B. 597; Hardy *v.* Chesapeake Bank, 51 Md. 562; Plumer *v.* Lord, 9 Allen, 455; Kingman *v.* Graham, 51 Wis. 232; Sessions *v.* Rice, 70 Iowa, 306; Tiffany *v.* Anderson, 55 Iowa, 405; Vanneter *v.* Crossman, 42 Mich. 465; Peake *v.* Thomas, 39 Mich. 584; McMaster *v.* Insurance Co., 55 N. Y. 222; Phillips *v.* Gallant, 62 N. Y. 256; Blair *v.* Wait, 69 N. Y. 113; Pence *v.* Arbuckle, 22 Minn. 417; Staton *v.* Bryant, 55 Miss. 261; Davis *v.* Bowmar, ib. 671, 749; Mutual Ins. Co. *v.* Norris, 31 N. J. Eq. 583, 585; Kuhl *v.* Jersey City, 8 C. E. Green, 84; Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Kinnear *v.* Mackey, 85 Ill. 96; Leeper *v.* Hersman, 58 Ill. 218; Horn *v.* Cole, 51 N. H. 287; Chellis *v.* Coble, 37 Kans. 558; Brant *v.* Virginia Coal Co., 93 U. S. 327; Casey *v.* Galli, 94 U. S. 674; infra, pp. 631 et seq. As there need not be any actual design that the representation should be acted upon, there need be no design to defraud. Pitcher *v.* Dove, 99 Ind. 175, 178; Anderson *v.* Hubble, 93 Ind. 570; Continental Bank *v.* National Bank, 50 N. Y. 575; Blair *v.* Wait, 69 N. Y. 113; Stevens *v.* Dennett, 51 N. H. 324. See Foster *v.* Charles, 6 Bing. 396; s. c. 7 Bing. 105; Pasley *v.* Freeman, 3 T. R. 51; s. c. Bigelow's L. C. Torts, 1.

[2] Clearly there need be no intention to deceive. Galbraith *v.* Lunsford, 87 Tenn. 89, married woman; and comp. the action for deceit, 1 Bigelow, Law of Fraud, 538.

[3] For illustrations see Tyler *v.* Odd Fellows Assoc., 145 Mass. 134, 138; Moore *v.* Spiegel, 143 Mass. 413, 417; Stebbins *v.* Bruce, 80 Va. 389, 392; Durant *v.* Pratt, 55 Vt. 270; Parker *v.* Moore, 59 N. H. 454; Robb *v.* Shephard, 50 Mich. 189; McCann *v.* Atherton, 106 Ill. 31 (casual remarks); Fawcett *v.* New Haven Organ Co., 47 Conn. 224; Danforth *v.* Adams, 29 Conn. 107; Farist's Appeal, 39 Conn. 150; McAdams *v.* Hawes, 9 Bush, 15; Zuchtmann *v.* Roberts, 109 Mass. 53; Kuhl *v.* Jersey City, 8 C. E. Green, 84; Muller *v.* Pondir, 55 N. Y. 325; Davis *v.* Smith, 43 Vt. 269; Planters' Ins. Co. *v.* Selma Bank, 63 Ala. 585; Townsend *v.* Cowles, 31 Ala. 428; Cravens *v.* Kitts, 64 Ind. 581; Williams *v.* Jackson, 28 Ind. 334; Long *v.* Anderson, 62 Ind. 537; Allum *v.* Perry, 68 Maine, 232; Pierce *v.* Andrews, 6 Cush. 4; Hall *v.* Cavanaugh, 6 Mo. App. 143; Chandler *v.* White, 84 Ill. 435; Davidson *v.* Young, 38 Ill. 152; Flower *v.* Elwood, 66 Ill. 447. Comp. also the language of Holmes, J. in O'Donnell *v.* Clinton, 145 Mass. 461, 463, in regard to assent.

though a purchaser of the property was induced by such receipt to pay the whole consideration. The collector, it was said, did not give the receipt knowing that it would be used for such a purpose, nor did the mere giving the receipt raise a presumption that it would be used to defraud a purchaser. So a third person to whom the representation was not made cannot claim the estoppel unless it was intended or apparently intended that he should act upon it.[1]

The most important case upon this subject after Pickard *v.* Sears is perhaps Freeman *v.* Cooke,[2] which was decided by the Court of Exchequer in the year 1848, and led the court to explain the term 'wilfully' ('where one by his words or conduct wilfully causes another to believe,' etc.) as used in the case of Pickard *v.* Sears.[3] It was an action of trover by the assignees of William Broadbent against the sheriff of Yorkshire, for goods of the bankrupt. There were pleas of not guilty, not possessed, and leave and license. The conversion alleged was the seizure of the goods by the defendant's officers under a fieri facias against Joseph and Benjamin Broadbent. It appeared that when the officers entered, the bankrupt told them the goods seized were the property of *Benjamin;* he did so supposing that the officer had no writ against Benjamin. Afterwards he contradicted that statement, and said they were the goods of his brother Joseph. It was contended that this representation bound William because it induced the officers to seize, and that he could not complain of that act, nor could the assignees who claimed under him. The jury found that the goods were really William's; but they also found 'that William represented the goods to the sheriff's officers as the goods of Benjamin *so as* to induce them by that false representation to seize them;' and the question was whether this finding was sufficient to estop the bankrupt and the plaintiffs as his assignees from complaining of the seizure of the goods. The question was answered in the negative, the court declaring, however, in effect that intention to have the representation acted upon might be presumable as well as actual, so that a man would be bound as well when his conduct

[1] Mayenborg *v.* Haynes, 50 N. Y. 675.

[2] 2 Ex. 654.

[3] Ante, p. 558.

or the circumstances of the case justified the inference of intention as when he actually intended the result.[1] Negligence when naturally and directly [2] tending to indicate intention will therefore have the same effect in creating the estoppel as actual intention. The point is well settled.[3] But mere want of care towards preventing an unauthorized transfer of one's property or the like act creates no estoppel; otherwise a man might be

[1] The judgment of the court was delivered by Parke, B. who, referring to the rule in Pickard *v.* Sears, said: 'That was founded on previous authorities in the cases Graves *v.* Key, 3 Barn. & Ald. 313, and Heane *v.* Rogers, 9 Barn. & C. 586, and has been acted upon in some cases since. . . . Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question; but the proposition contained in the rule itself as above laid down in the case of Pickard *v.* Sears must be considered as established. By the term "wilfully," however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon and that it is acted upon accordingly; and if whatever a man's real intention may be he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner, omitting to inform his customers of the fact in the usual mode that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized. But if we apply this rule either in the terms in which it is enunciated in Pickard *v.* Sears or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and whatever intention he had on his first statement was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation taken altogether. In truth, in most cases to which the doctrine in Pickard *v.* Sears is to be applied the representation is such as to amount to the contract or license of the party making it. Here there is no pretence for saying it amounted to a license, and a contract is out of the question.'

[2] Tracy *v.* Lincoln, 145 Mass. 357, 360; Carr *v.* London Ry. Co., L. R. 10 C. P. 307; Arnold *v.* Cheque Bank, 1 C. P. D. 578; Vagliano *v.* Bank of England, 23 Q. B. D. 243, C. A. affirming 22 Q. B. D. 103.

[3] Besides the cases just cited, see Griffeth *v.* Brown, 76 Cal. 260; Montgomery *v.* Keppel, 75 Cal. 128; Hardy *v.* Chesapeake Bank, 51 Md. 562; Manufacturers' Bank *v.* Hazard, 30 N. Y. 226; Horn *v.* Cole, 51 N. H. 227; Pence *v.* Arbuckle, 22 Minn. 417; Kingman *v.* Graham, 51 Wis. 232; Brant *v.* Virginia Coal Co., 93 U. S. 326; ante, p. 629, note 1. And see Breeze *v.* Brooks, 71 Cal. 169, 182; Gillett *v.* Wiley, 126 Ill. 310, 324.

precluded from alleging that his signature had been forged, on the ground that he had negligently employed a dishonest clerk. It is only where the negligence is a breach of duty to the party claiming the estoppel, as e. g. where it has amounted to permitting another to clothe himself with an apparent authority to act for the party against whom the estoppel is alleged, that the rule of intention is satisfied.[1]

The language of Lord Denman in Pickard *v.* Sears is also examined and explained in the recent case of Cornish *v.* Abington.[2] This was an action of debt for goods sold and delivered, work done and materials provided, and on accounts stated. It appeared that the plaintiff, a lithographic printer, took into his employment one Gover to superintend the printing and take orders for printing, at a salary of 35*s.* a week. The defendant was a publisher. The plaintiff stated that the first order on the defendant's account came from Gover. In September, 1857, the plaintiff made out an account against the defendant, charging him with £108 for printing maps, and gave it to Gover, who handed the account to the defendant, and the defendant paid it. Afterwards further printing was done by the plaintiff, and paper supplied by him. The plaintiff sent the goods, some of them being accompanied with delivery notes signed by himself, for which receipts were signed by the defendant; while in other in-

[1] See ante, p. 596; Swan *v.* North British Co., 7 Hurl. & N. 603; s. c. 2 Hurl. & C. 175; Holmes *v.* Trumper, 22 Mich. 427; Greenfield Bank *v.* Stowell, 123 Mass. 196; People *v.* Bank of North America, 75 N. Y. 548. The learned judge in the last case (at p. 562) asserts that 'a party may also be estopped by his negligence when his name has been forged, and for an unreasonable time he neglects, not to discover the forgery, but to give notice thereof after discovery to the party imposed on. Canal Bank *v.* Bank of Albany, 1 Hill, 287.' It is certainly good morals and it may be good law to require a man to give notice of a forgery of his signature, if he has notice that the party holding the paper is in a position to save his own rights against others. Viele *v.* Judson, 82 N. Y. 32; Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; ante, p. 596; McKenzie *v.* British Linen Co., 6 App. Cas. 82. A person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, cannot be held an estoppel against asserting the forgery. McKenzie *v.* British Linen Co., supra. To the same effect with the last sentence, see Zell's Appeal, 103 Penn. St. 344.

[2] 4 Hurl. & N. 549.

stances the delivery notes were from Gover. Gover having left the plaintiff's service in the year 1858, the plaintiff afterwards called upon the defendant for a settlement of his account. The defendant said he knew nothing about it. The plaintiff asked him if he had not received the account, and the defendant replied that he had had no transactions with the plaintiff, — he owed the money to Gover. He admitted having received the invoice of the paper, and produced it. This invoice charged him as debtor to the plaintiff. The defendant stated that Gover had applied to him to publish various works and maps for himself, which the defendant agreed to do, and that he had paid over to Gover the proceeds of the sales, only deducting the commission, and that on receiving the invoice of paper above referred to he asked an explanation of it. Gover replied, 'That fool Cornish has been making out invoices himself, and has charged you instead of me. I will see him on the subject; he will at once see that it is an error, and you will hear no more about it.' The defendant said that he was satisfied with this explanation, and he heard no more about it till the interview with the plaintiff above mentioned. He said that Gover had no authority to pledge his credit with the plaintiff. It was not disputed that as between Gover and the defendant the account was settled. The jury found that the defendant did not authorize Gover to use his name in ordering the work to be done; but they also decided that the manner in which the defendant had signed the receipts was such as to induce the plaintiff to think that he was buying the goods on his own account.

Judgment was given for the plaintiff; the ground being that the jury had found that the defendant, whether intentionally or not, had led the plaintiff to form an opinion that he was dealing with the defendant, and had induced him to furnish goods to the defendant.[1] The learned Chief Baron declared the true rule to

[1] 'The sending of the invoice was equivalent to notice that the defendant was not dealing with Gover, but with the plaintiff. If after that the defendant chose to accept the explanation of Gover, when he ought not to have been satisfied without communication with the plaintiff, he must take the consequences. Lord Wensleydale, formerly Baron Parke, in Freeman v. Cooke, 2 Ex. 654 [ante, p. 631, note], commenting on the earlier case of Pickard v. Sears, pointed out a limitation of the application of the rule, viz. that "in most cases

be that if a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person by a course of conduct or by actual expressions so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. In the present case the plaintiff had given notice that he understood that the defendant was dealing with him. The defendant gave no answer. He ought to have sent back the invoice.

Mr. Baron Bramwell put the case upon the same ground. It was a strong fact, he remarked, that the plaintiff for a long time had supposed himself to be dealing with the defendant. When this was brought to the attention of the defendant, he had been content to take the word of the servant who was defrauding his master. Taking the finding of the jury that the plaintiff supposed that he was dealing with the defendant, and that the defendant's conduct was such as reasonably to induce that belief, he thought that the rule referred to by the Lord Chief Baron applied. The rule was that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it.

Mr. Baron Martin, though agreeing in the general conclusion, doubted whether there could be an estoppel without intention; and this and the like cases which proceed upon the ground of

to which the doctrine of Pickard *v.* Sears is to be applied the representation is such as to amount to the contract or license of the party making it." No doubt unless the representation amounts to an agreement or license, or is understood by the party to whom it is made as amounting to that, the rule would not apply; but although the case of Freeman *v.* Cooke limited the application of the rule to this extent, the court point out that the word "wilfully," in the rule as laid down in Pickard *v.* Sears, means nothing more than "voluntarily." Lord Wensleydale perceiving that the word "wilfully" might be read as opposed, not merely to "involuntarily," but to "unintentionally," showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow.'

presumable intention, though enunciating a perfectly sound doctrine, should be followed only when there is clear justification for the act of the party who supposed an intention.[1]

The necessity of evidence of intention to make a dedication to the public (which may be done in pais, and by conduct, as well as by deed[2]) may be noticed here. In a case[3] in which the plaintiff sought to restrain the defendants from exercising authority over a strip of land as a highway the defendants rested their claim on the following facts: The heirs of one Gouverneur had several years before opened and fenced a strip of land communicating with a public road at one end, with the intention of making a dedication of it as a highway. The strip was mapped and designated as a public way, with the consent of the owners, upon a map of the village of Cold Spring. The land so opened and fenced was used by the public from that time, by walking and driving upon it, until the plaintiff closed it. The court held that there had been no dedication on the ground that there was no evidence of a positive intention.[4] But one who fences off a

[1] See Zuchtman *v.* Roberts, 109 Mass. 53; Wright *v.* Willis, 2 Allen, 191.

[2] McCormick *v.* Baltimore, 45 Ind. 512; Shane *v.* Moberly, 79 Mo. 41; Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246; Beatty *v.* Kurtz, 2 Peters, 566; Hunter *v.* Sandy Hill, 6 Hill, 407.

[3] Holdane *v.* Cold Spring, 21 N. Y. 474.

[4] The law was thus stated by Wright, J. in delivering the opinion of the court: 'Undoubtedly the owner of land may dedicate or set apart a street or highway through it to the public use, and if the dedication be accepted, it will work an estoppel in pais, precluding the owner from asserting any right inconsistent with such use. The dedication and acceptance are to be proved or disproved by the acts of the owner and the circumstances under which the land has been used. Both are questions of intention. The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication. In the case of a highway the public must accept the dedication, and before it is accepted the owner is not precluded from revoking it. It is not necessary that there should be any formal act of acceptance by the public authorities, but it may be indicated by common user under circumstances showing a clear intent to accept and enjoy as such the easement proposed to be dedicated. Throwing open land in a village and fencing it on each side, and causing the way or avenue to be designated as public on a map of the village, are acts tending strongly to show a design presently or at some future period to dedicate and devote it to the public use. But these acts are not conclusive to establish a present dedication binding on the owner of the land. One may fence off a strip of his own land for the purpose of

strip of land as a street, and without objecting sees others build with reference to it as such, will be estopped to deny that he had made a dedication.[1]

Where an inquiry has been made which has resulted in the representation in question, it is necessary that the purport of the inquiry should be made clear;[2] if that be not the case, there cannot be said to be any intention, whether actual or presump-

a passage-way opening on a public street, or he may lay out a street through it with the view of subdividing his land bounded upon it into village lots, intending upon the sale of such lots to dedicate the street to the use of the public; but in such cases, though the public may have occasionally or indeed at all times used the open way in passing to and from the enclosure of an adjoining proprietor, it could scarcely be pretended that the land had thereby become burdened with an irrevocable public servitude.' In a subsequent portion of his opinion the learned judge says that the doctrine of estoppel is at the basis of the law concerning dedication. 'The referee,' he observes, 'did not find the fact of dedication; and the facts that are specifically found do not in my judgment show that the public acquired a right to the use of the land as a street or highway by dedication of the former or present owner. Assuming, however, that enough was done by the owners to constitute a present dedication of the land, I think they still had a right to revoke it. The law of dedication is somewhat anomalous; but it may be said to rest in part at least upon the doctrine of estoppel in pais. Though the owner of land in a city or village may evince by his acts an intention to dedicate a street or square, or other plat of ground, to the public use, no sufficient or valid reason can be assigned against a change of purpose and a subsequent resumption of the possession unless the public accommodation and private rights are to be materially affected by an interruption of the enjoyment. Cincinnati *v.* White, 6 Peters, 431; Haynes *v.* Thomas, 7 Ind. 38. See also Rutherford *v.* Taylor, 38 Mo. 315; Price *v.* Thompson, 48 Mo. 361. If, however, private rights have been acquired with reference to such dedication, and such an interest secured with the assent and concurrence of the owner as would render it fraudulent in him to resume his rights, the dedication becomes irrevocable. As in the present case, if the owner of the land had opened the way in question with the intention to dedicate it to public use as a street, and building lots had been sold and built upon, bounded on it, with the understanding on the part of the purchasers that the land was permanently devoted to public use, or perhaps if the public accommodation were to be seriously impaired or affected by an interruption of the use or enjoyment of the subject of the dedication, the owner would be precluded from reclaiming his land.'

[1] Chicago *v.* Wright, 69 Ill. 318. See also Mansur *v.* Haughey, 60 Ind. 364; Wilder *v.* St. Paul, 12 Minn. 192; Columbus *v.* Dahue, 36 Ind. 330; Hiss *v.* Baltimore Ry. Co., 52 Md. 242; Boyce *v.* Kalbaugh, 47 Md. 334; Neff *v.* Bates, 25 Ohio St. 169; Morgan *v.* Railroad Co., 96 U. S. 716.

[2] A party to a mortgage being inquired of by one to his knowledge about to buy it, concerning his liability upon it, said that he had 'assumed and agreed to pay the debt, as his deed would show.' It was held that he was estopped thereby after purchase to deny his liability. Bassett *v.* Bradley, 48 Conn. 224. See also Stebbins *v.* Bruce, 80 Va. 389, 392.

tive, that the representation should be acted upon.[1] Pierce *v.* Andrews was an action of trespass against a deputy-sheriff for taking the plaintiff's horse. It appeared that one Brooks, having an execution against the plaintiff's father, sent his agent to the plaintiff, in whose possession the horse was, to inquire whose property it was; and the agent, without disclosing his agency or informing the plaintiff of the object of his inquiry, asked who was owner of the horse. The plaintiff replied that the horse belonged to his father. Brooks now sent the defendant to levy upon the horse in accordance with the execution, when the plaintiff claimed the property and forbade the sale. The court held that the plaintiff was not estopped by the representation to maintain the action; but it was said that the case might have been different had the plaintiff known the object of the inquiry and permitted the sale to take place without objection.[2] No one, however, could be estopped, it was declared, by a deceptive answer to a question which he might rightly deem impertinent.

In the case of Andrews *v.* Lyon, above cited, the plaintiff, as indorsee, sued the maker of a promissory note, to which the defence was that the note was given for intoxicating liquors sold in violation of law. On the trial it appeared that the note was offered for sale to the plaintiff, who, before closing the bargain, showed it to the defendant and inquired whether it was 'all right;' to which the defendant answered, 'Yes, it is all right; I shall pay it soon.' The court observed that there was no evidence that the defendant had any knowledge that the plaintiff intended to act upon the statement made by him; there was nothing in the evidence inconsistent with a belief on the part of the defendant, at the time he made the statement, that the plaintiff was then owner of the note.

[1] Pierce *v.* Andrews, 6 Cush. 4; Andrews *v.* Lyon, 11 Allen, 349; Kinney *v.* Whiton, 44 Conn. 262, 269; Durant *v.* Pratt, 55 Vt. 270; Hackett *v.* Callender, 32 Vt. 97; Fountain *v.* Whelpley, 77 Maine, 132; Morton *v.* Hodgdon, 32 Maine, 127; Tillotson *v.* Mitchell, 111 Ill. 518. The party supposed to be estopped should make known his rights within a reasonable time after the action taken has come to his knowledge, or he will make the alleged estoppel good by ratification. Fountain *v.* Whelpley, supra, and cases cited.

[2] Stephens *v.* Baird, 9 Cowen, 274.

§ 6. *The Representation must have been acted upon.*

The rule is fundamental that unless the representation of the party to be estopped has also been really acted upon,—the other party acting differently, that is to say, from the way he would otherwise have acted, so that to deny the representation would prejudice him,[1]—no estoppel arises.[2] Neither a statement of any kind nor an admission in pais[3] can amount of itself to conclu-

[1] It does not prejudice one in law to do something one was bound to do. Gulf R. Co. *v.* Gordon, 70 Texas, 80.

[2] For various illustrations see Cropper *v.* Smith, 28 Ch. D. 700 (reversed on other points in 9 App. Cas. 249, as Smith *v.* Cropper); Howard *v.* Hudson, 2 El. & B. 1; McCance *v.* London & Northwestern Ry. Co., 7 Hurl. & N. 477; Stimson *v.* Farnham, L. R. 7 Q. B. 175; Townsend Bank *v.* Todd, 47 Conn. 190; Daniels *v.* Equitable Ins. Co., 48 Conn. 101; Hull *v.* Hull, ib. 250; Tyler *v.* Odd Fellows Assoc., 145 Mass. 134, 138; Birch *v.* Hutchings, 144 Mass. 561, 564; Butchers' Assoc. *v.* Boston, 139 Mass. 290, 293; Earl *v.* Stevens, 57 Vt. 474; Askins *v.* Coe, 12 Lea, 672; Lawrence *v.* Towle, 59 N. H. 28; Barney *v.* Keniston, 58 N. H. 168; Maxwell *v.* Bay City Bridge Co., 46 Mich. 278; Canning *v.* Brown, 50 Mich. 436; Union Ins. Co. *v.* Slee, 123 Ill. 57; Powell *v.* Rodgers, 105 Ill. 318; Davidson *v.* Young, 38 Ill. 146; Golconda *v.* Field, 108 Ill. 419; Illinois Masons' Soc. *v.* Baldwin, 86 Ill. 479; Ball *v.* Hooton, 85 Ill. 159; Hefner *v.* Vandolah, 57 Ill. 520; Hall *v.* Jackson Co., 95 Ill. 353; Palmer *v.* Meiners, 17 Kans. 478; Marqueze *v.* Fernhadez, 30 La. An. 195; Chaffe *v.* Morgan, ib. 1307; McClure *v.* Livermore, 78 Maine, 391; Groves *v.* Blondell, 70 Maine, 190; Michigan Panelling Co. *v.* Parsell, 38 Mich. 475; Van Horn *v.* Overman, 75 Iowa, 421; Guest *v.* Burlington Opera House Co., 74 Iowa, 457; Laub *v.* Trowbridge, 71 Iowa, 396; Eikenberry *v.* Edwards, 67 Iowa, 14, 21; Northern Packet Co. *v.* Platt, 22 Minn. 413; McAbe *v.* Thompson, 27 Minn. 134; Sulphine *v.* Dunbar, 55 Miss. 255; Davis *v.* Bowmar, ib. 671; Eitelgeorge *v.* Mutual Building Assoc., 69 Mo. 52; Spurlock *v.* Sproule, 72 Mo. 503; Wright *v.* McPike, 70 Mo. 175; Rogers *v.* Marsh, 73 Mo. 64; Burke *v.* Adams, 80 Mo. 504, 514; Monks *v.* Belden, ib. 639; Murphy *v.* People's Ins. Co., 7 Allen, 239; Colonius *v.* Hibernia Ins. Co., 3 Mo. App. 56 (the last two cases deciding that adjustment of loss not made final and accepted does not estop an insurance company to withdraw it and allege breach of condition); Stryker *v.* Cassidy, 76 N. Y. 50 (that an account rendered but not assented to does not estop the party to claim a larger sum, see Williams *v.* Glenny, 16 N. Y. 389); Winegar *v.* Fowler, 82 N. Y. 315; McMaster *v.* Insurance Co. 55 N. Y. 222; Probate Court *v.* St. Clair, 52 Vt. 24; Clark *v.* Hayward, 51 Vt. 14; Lorentz *v.* Lorentz, 14 W. Va. 809 Warder *v.* Baldwin, 51 Wis. 450; Guichard *v.* Brande, 57 Wis. 534; Conkey *v.* Hawthorne, 69 Wis. 199; Ketchum *v.* Duncan, 96 U. S. 659; Harris *v.* Kirkpatrick, 6 Vroom, 392; Stringer *v.* Northwestern Ins. Co., 82 Ind. 100; Colter *v.* Calloway, 68 Ind. 219.

[3] Hunter *v.* Heath, 67 Maine, 507; Robbins *v.* Blodgett, 121 Mass. 584; Sullivan *v.* Conway, 81 Ala. 153. Thus, the official reports of municipal officers charging themselves with indebtedness may be shown by them to have been erroneous. State *v.* Hauser, 63 Ind. 155,

sive evidence. But if, on the other hand, the representation has been acted upon promptly,[1] under circumstances such as those already detailed, the party making the statement or guilty of the conduct in question will be precluded from alleging the contrary of that which he has given the other party to understand to be true. And it matters not, if the party acting upon the representation was justified in so doing, *how* he has changed his position, whether by the purchase of property, the surrender of possession, the erection of improvements or other outlay upon land or goods about which the estoppel is claimed, or the expenditure of money in litigation,[2] or, it is held, even by being induced to refrain from steps which would otherwise probably have been taken.[3] But unless the representation is in some way acted upon, unequivocally, as tested by the first step taken,[4] the estoppel cannot arise,[5] nor will any estoppel arise when the party acting upon the representation has done only what he was legally bound to do.[6] And though, as we have seen,[7] it need not be exclusively acted upon, there can be no estoppel where

limiting State *v.* Grammer, 29 Ind. 530; Wilmer *v.* State, 44 Ind. 223; State *v.* Prather, ib. 287; Van Ness *v.* Hadsell, 54 Mich. 561. See also Almy *v.* Thurber, 99 N. Y. 407. As to solemn admissions in court, see ante, p. 571, note 2.

[1] Andrews *v.* Ætna Ins. Co., 85 N. Y. 334.

[2] As to estoppel arising by expenditures in litigation, see Meister *v.* Birney, 24 Mich. 435.

[3] Leather Manuf. Bank *v.* Morgan, 117 U. S. 95; Continental Bank *v.* National Bank, 50 N. Y. 575; Davis *v.* Dyer, 56 N. H. 143; Steele *v.* St. Louis Ins. Co., 3 Mo. App. 207; Tobin *v.* Allen, 53 Miss. 563; Voorhis *v.* Olmstead, 66 N. Y. 113; Knights *v.* Wiffen, L. R. 5 Q. B. 660; Hambleton *v.* Central Ohio R. Co., 44 Md. 551; Allen *v.* Goodnow, 72 Maine, 420. See Hawkins *v.* Methodist Church, 23 Minn. 256; ante, p. 583; post, p. 645.

[4] Andrews *v.* Ætna Ins. Co., 85 N. Y. 334.

[5] Hence a representation made *after* the change of position will not work an estoppel. Townsend Bank *v.* Todd, 47 Conn. 190; Gee *v.* Moss, 68 Iowa, 318; Behrens *v.* Germania Ins. Co., 64 Iowa, 19, 23; McCall *v.* Powell, 64 Ala. 254; Straus *v.* Minzesheimer, 78 Ill. 492; Crossan *v.* May, 68 Ind. 242; Reagan *v.* Hadley, 57 Ind. 509; Jones *v.* Dorr, 19 Ind. 384; Ray *v.* McMurtry, 20 Ind. 307; Patrick *v* Jones, 21 Ind. 249; Stutsman *v.* Thomas, 39 Ind. 384; Garlinghouse *v.* Whitwell, 51 Barb. 208. But though a contract, e. g. of sale, has been made before the misrepresentation, still, if it has not yet been performed, an estoppel will arise if performance was induced by the misrepresentation. Goeing *v.* Outhouse, 95 Ill. 346. See also Roberts *v.* Davis, 72 Ga. 819. A representation may be withdrawn, with notice, before it has been acted upon. Union Ins. Co. *v.* Slee, 123 Ill. 57.

[6] Organ *v.* Stewart, 60 N. Y. 413, reversing 1 Hun, 411.

[7] Ante, pp. 582, 583.

the party claiming one is obliged, before changing his position, to inquire for the existence of other facts to make the inducement sufficient, and to rely upon them also in acting.[1] In other words, though the party may no doubt act upon any one of several representations or inducements from different sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources.

The rule that the representation must have been acted upon in order to the estoppel under consideration is illustrated by Howard *v.* Hudson.[2] This was an action of trespass for false imprisonment. The question of estoppel arose in reference to the warrant. It appeared that the defendant had only a copy of the warrant, but that the plaintiff had been led to believe that he had the original. It was held that the defendant was not estopped to show the fact; the plaintiff not having acted upon the representation.[3]

[1] McMaster *v.* Insurance Co. of N. A., 55 N. Y. 222. See St. Joseph Manuf. Co. *v.* Daggett, 84 Ill. 556; Mutual Ins. Co. *v.* Norris, 31 N. J. Eq. 583; Baldwin *v.* Richman, 1 Stockt. 399; Richman *v.* Baldwin, 1 Zabr. 403; People *v.* Bank of North America, 75 N. Y. 548.

[2] 2 El. & B. 1.

[3] 'Did the defendant,' said Mr. Justice Erle, 'make a misrepresentation to the plaintiff with intent that the plaintiff should act upon it, and did the plaintiff in consequence so act upon it to his prejudice? The jury have found that the defendant acted as if he had the original, and led the plaintiff to believe he had it; so that there was a representation. But did the plaintiff alter his position for the worse in consequence of that representation? It is clear to my mind that whether the original warrant or a copy of it was annexed to the return, the conduct of the defendant in putting the plaintiff in the remand ward would equally be justified. But the ground mainly relied on seems to be that the plaintiff supposed that the defendant had the original, and therefore lost time and money in applications to a judge and to the Court for the Relief of Insolvent Debtors. But in fact the ground of these applications was that the warrant was not a sufficient authority for the plaintiff's discharge. That was his contention before the judge and the Court for the Relief of Insolvent Debtors; so that it is clear that he did not make these applications in consequence of believing the representation that the defendant had the warrant, but notwithstanding that he believed that representation.' 'I think,' observed Crompton, J. 'that every case in which we are to act upon it [the doctrine of estoppel] must be brought within the principles so accurately laid down in the elaborate judgment in Freeman *v.* Cooke, 2 Ex. 654; and in the present case there is on the finding of the jury a want of the two great ingredients; for it is not found that the defendant intended that the plaintiff should act on the faith of the representation, nor that the plaintiff did so act. The word "wilfully," which is used in the judgment in Pickard *v.* Sears, 6 Ad. & E. 469, has been well commented upon in

There is another English case on this point which is instructive.[1] It was an action against a railway company for failing to carry horses safely. It appeared that when the plaintiff delivered the horses to the defendants, he signed a declaration at their request that the value of the horses did not exceed £10 each, and that in consideration of the rate charged he thereby agreed that the horses were to be carried at his own risk. The horses were injured on the way by reason of a defect in the conveyance. The defendants paid into court £25, and this would have been sufficient to cover their liability if the horses had been worth only £10 each as the plaintiff represented; but in fact they were worth more than this, and at their true value the loss would be £65. This amount the plaintiff claimed in the present action; but the court held him estopped by his representation to the company.[2]

The following facts afford another illustration of the rule requiring the representation to be acted upon: A owns stock in a company which B by forgery assumes to convey to C. C takes the evidence of his supposed title to the company and has the company register the stock in favor of D, an innocent purchaser for value. There is no estoppel upon the company to show that the transfer of title to D was void, since D was not

the judgment in Freeman *v.* Cooke. As the rule is there expressed it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not malo animo or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way. That is the true criterion.'

[1] McCance *v.* London & Northwestern Ry. Co., 7 Hurl. & N. 477.

[2] 'There is,' said Bramwell, B. 'a stipulation or statement, whether a representation or contract is immaterial, by which the plaintiff with a view to induce the defendants to act (and they have acted) upon it has said that the value of each horse did not exceed £10, and he now professes to say, True it is I did make that statement in order that the defendants might act upon it; and true it is they have acted upon it; but the statement was untrue, and now I want four times as much as the declared value of one of the horses. (*a*) This is in effect what he is doing. I think that according to every principle of law he cannot be allowed to do so. If there be one principle of law more clear than another, it is this, that when a person has made a deliberate statement with the view to induce another to act, and he has acted upon it, the former is not at liberty to deny the truth of the statement so made. I think it would be most mischievous if he could.'

(*a*) £40 in addition to the sum paid into court.

induced by the company to act.[1] In like manner, a person who has accepted stock from a corporation and voted upon it may, to bring himself within a statutory protection, show that he holds the same from the company merely as collateral security, though it is registered to him in his own name, if no one has been induced thereby to believe the party an absolute owner, and so to subscribe to the stock or give credit to the corporation.[2]

A sheriff's or other officer's return also, if not acted upon, may be shown by him to be erroneous in an action against him by a party to the writ.[3] In Stimson *v.* Farnham an action was brought against a sheriff for not levying under a writ of fieri facias, and for a false return. The pleas were not guilty, nulla bona, except as to the claim in respect of the return, and that after seizure of the goods by the defendant the plaintiff ordered him to withdraw from possession; whereupon he did so and made the return complained of. It appeared at the trial that the plaintiff had obtained judgment against one Fellows, and that the sheriff went upon the premises of the debtor and seized goods there, which were, however, in the possession of a claimant under a bill of sale. The sheriff's officer at the plaintiff's request remained upon the premises until dismissed by him. In the mean time the goods were sold under the bill of sale. A return having been called for, the sheriff returned that he had seized *the goods of Fellows.* The retention and the withdrawal from possession under orders from the plaintiff were also stated in the return. The jury found that the bill of sale was valid; and thereupon a verdict was entered for the defendant. A rule for a new trial was now asked for on the ground that the de-

[1] Simm *v.* Anglo-American Tel. Co., 5 Q. B. D. 188, C. A.

[2] Burgess *v.* Seligman, 107 U. S. 20, denying Griswold *v.* Seligman, 72 Mo. 110, and Fisher *v.* Seligman, 75 Mo. 13.

[3] Stimson *v.* Farnham, L. R. 7 Q. B. 175; Harris *v.* Kirkpatrick, 6 Vroom, 392; State *v.* Ogle, 2 Houst. 371; Rogers *v.* Cromack, 123 Mass. 582; Denny *v.* Willard, 11 Pick. 519, 526; Roberts *v.* Wentworth, 5 Cush. 192; Pate *v.* Harper, 94 N. Car. 23. And conversely it is not binding on the party to the writ. Ogle *v.* Smith, 2 Houst. 174. But see contra, Dunklin *v.* Wilson, 64 Ala. 162, on the ground that it is part of the record. And see State *v.* Penner, 27 Minn. 269, holding a return under oath as conclusive upon the parties to the record and upon the sheriff, citing Brown *v.* Davis, 9 N. H. 76; Baker *v.* McDuffie, 23 Wend. 289; Browning *v.* Hanford, 7 Hill, 120.

fendant was concluded by his return. The decision was against the plaintiff; the return not having been acted upon by him.[1]

[1] 'An action against a sheriff,' said Blackburn, J. 'for a false return will not lie unless actual damage has been caused to the plaintiffs; and in the present case on the finding of the jury that the goods seized were not the debtor's goods there was no damage, and the action will not lie. But then was the sheriff estopped by his return? The general rule is that what a man says is evidence against him, and nothing more. He may show that what he said was a wilful untruth. Nevertheless, there are a good many cases in which a man is not permitted to contradict his assertions, and in which he is precluded or in technical language estopped from doing so; as in the cases of Pickard *v.* Sears, 6 Ad. & E. 469, and Freeman *v.* Cooke, 2 Ex. 654. But I do not see anything to bring this return of the sheriff that the goods seized were goods of the debtor — a mere averment preliminary to his answer — within the principle of estoppel, and I do not understand why the fact of his being sheriff should make it operate as an estoppel. Where the sheriff has made a return by which he shows a state of things, such as that the plaintiff is entitled to receive the money, then the question is quite a different one, for the sheriff says he has money in his hands belonging to the plaintiff. The plaintiff according to the record as it then stands is entitled to have the money. Mildway *v.* Smith, 2 Wms. Saund. 343, was not an action for a false return. The sheriff had returned that he did seize the goods of the debtor and should have levied the debt but that they were rescued out of custody. The plaintiffs brought an action on scire facias, and the Court of Common Pleas held that the sheriff was bound by his return, and consequently that the plaintiffs were entitled to have execution against him for the value of the goods, as he should have been prepared with sufficient force to resist those people who came to the rescue. Then error was brought, and it could not be denied that the return was bad, but an attempt was made to impugn the judgment of the court below because credit had been given for the value of the goods as returned by the sheriff; to which the answer of the Queen's Bench in effect was: He has by his own fault put the plaintiffs to an end of their suit; for they cannot sue a new execution except only for the surplus of the debt over and above the sum returned, and we cannot order the goods to be sold because they are out of the sheriff's hands. And so, on those proceedings, the sheriff was estopped. That seems reasonable enough. Again, the case of Clerk *v.* Withers, 2 Ld. Raym. 1075, related to quite a different matter. Lord Holt, there considering the effect of the execution creditor dying after seizure and before sale, points out that the position of the creditor was altered by the goods having been seized, for that he had no further remedy against the judgment debtor, but must proceed against the sheriff, who was bound to sell the goods and was bound to the value he had stated them to be of in his return, and was not hindered from selling by the death of the execution creditor; and Mildway *v.* Smith was cited. Neither of these cases is authority for saying that the present defendant was estopped by his return. Then in Remmett *v.* Lawrence, 15 Q. B. 1004, is a passage which is the only authority supporting the argument of the plaintiff. Lord Campbell, C. J. is reported to have said that if the sheriff had returned that he had got the debtor's goods, he would have been estopped. The observation may possibly have been misunderstood, but more probably the learned judge in forgetfulness used inaccurate language. The dictum was

This rule of the necessity of a prejudice to the party claiming the existence of an estoppel is also illustrated by the case of Schmaltz *v.* Avery.[1] That was an action of assumpsit on a charter-party, not under seal, against the defendant for not taking the cargo on board. The charter-party in terms stated that it was made by the plaintiffs as agents for the freighters. It then stated the terms of the contract and concluded with these words: 'This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. [the plaintiff] shall cease as soon as the cargo is shipped.' The declaration treated the charter-party as made between the plaintiff and the defendant, without mentioning the character of the plaintiff as agent and without any reference to the concluding clause; thereby treating the plaintiff as principal. At the trial it was proved that in point of fact the plaintiff was the real freighter. At the close of the trial it was objected that the plaintiff was concluded by the terms of the charter-party and fixed with the character of agent so that he could sue only in that character. The case having gone to the Queen's Bench, the court overruled the objection.[2]

It is not enough that the representation has been barely acted upon; if still no substantial prejudice would result by admitting the party who made it to contradict it, he will not be estopped.[3] Thus, it is not enough that the representation has caused an

cited in the case of Levy *v.* Hale, 29 L. J. C. P. 130, by Williams, J. whose observations merely show that he had not made up his mind that Lord Campbell was not right. But the two cases he cited do not support the dictum, nor do I see any principle upon which it could be supported.' See to the same effect Barker *v.* Benninger, 14 N. Y. 270; Rivard *v.* Gardner, 39 Ill. 125.

[1] 16 Q. B. 655.

[2] In the course of his opinion Patteson, J. speaking for the court, said: 'In the present case the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter-party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was.'

[3] East *v.* Dolihite, 72 N. Car. 562; Adler *v.* Pin, 80 Ala. 351, 354, 355; Laub *v.* Trowbridge, 71 Iowa, 396, 399; Eikenberry *v.* Edwards, 67 Iowa, 14; Townsend Bank *v.* Todd, 47 Conn. 190; Jamison *v.* Miller, 64 Iowa, 402.

administrator to have property appraised and included in his inventory, so as to create a duty on his part to account,[1] or, it seems, that it has induced one to bring a suit.[2] Thus, again, though an officer has been induced by A to levy on his goods as those of B, still, if A before sale tell him they are his, A will not be estopped to claim them and have them returned unless B would be prejudiced thereby.[3] But the damage need not be shown to be a positive step taken to one's prejudice; it is enough, as has already been stated, to show that the party claiming the estoppel was induced by the other party to *refrain* from obtaining a *particular* benefit which he would otherwise have been reasonably sure of acquiring.[4] Indeed, it appears to be enough to show, if shown strongly, presumptive loss. Thus:

In the recent case of Knights *v.* Wiffen the defendant Wiffen was sued for the conversion of sixty quarters of barley. The facts as stated by Mr. Justice Blackburn were that the defendant had in his warehouse a large quantity of barley, and sold to one Maris eighty quarters, which on the contract between him and Maris remained in his possession as unpaid vendor. No particular sacks of the barley were appropriated as between Maris and Wiffen; but at the time the contract was made Maris had a right to have eighty quarters out of the barley appropriated to him, and at the same time Wiffen as the unpaid

[1] Adler *v.* Pin, 80 Ala. 351.

[2] Eikenberry *v.* Edwards, 67 Iowa, 14; and see Conkey *v.* Hawthorne, 69 Wis. 199, 202. See, however, Heyn *v.* O'Hagen, 60 Mich. 150, 155, where it is said, quoting Meister *v.* Birney, 24 Mich. 435, that 'expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditure.' And that is doubtless true; but would the mere bringing suit be enough?

[3] Warder *v.* Baldwin, 51 Wis. 450.

[4] Ante, p. 639; Knights *v.* Wiffen, L. R. 5 Q. B. 660; Leather Manuf. Co. *v.* Morgan, 117 U. S. 96; Voorhis *v.* Olmstead, 66 N. Y. 113; Bassett *v.* Holbrook, 24 Conn. 453. Comp. Digest, 9, 2, 23, § 1; Grueber, Lex Aquilia, pp. 62, 268, a similar principle of the Roman law. Still, it has been held that a defendant in trover, disclaiming ownership, who has represented to the plaintiff when demanding the property that it was in his possession and control, is not estopped to prove the contrary though the plaintiff has been induced to sue by reason of the representation. Jackson *v.* Pixley, 9 Cush. 490. But compare Finnegan *v.* Carraher, 47 N. Y. 493. It has also been held that a party will not be estopped by having disclaimed the ownership of property to an administrator and inducing him to proceed to an inventory and appraisal of the property; the administrator having done nothing more than his duty. Turner *v.* Waldo, 40 Vt. 51.

vendor had a right to insist on the payment of the price before any part of the grain was given up. Maris afterwards entered into a contract with the plaintiff Knights by which he sold him sixty sacks of the barley, and Knights paid him for them. A document was given by Maris to Knights in the form of a delivery order addressed to a station-master of the Great Eastern Railway, instructing him to deliver to Knights's order sixty quarters of barley on his (Maris's) account. Knights forwarded it to the station-master enclosed in a letter authorizing the station-master to hold it for him. The station-master went to Wiffen and showed him the delivery order and letters, and Wiffen said, 'All right; when you receive the forwarding note I will place the barley on the line.' Maris became bankrupt, and the defendant as unpaid vendor refused to deliver the barley when the forwarding note was presented to him by the station-master in behalf of the plaintiff. Judgment was given for the plaintiff. The ground taken was that Wiffen had recognized Knights as the person entitled to possession, and that Knights had rested assured on that admission of title and forborne to take steps (which he might otherwise have taken) to protect himself.[1]

[1] This case has been somewhat criticised (Langdell, Sales, 1028) on the ground that the statement of Wiffen to Knights that he would hold the barley for him was a *promise*, while an estoppel of this kind can only rest upon facts. But the promise of Wiffen clearly implied a disclaimer of title in himself, — as clearly as if he had stated that the barley did not belong to him. Any other ruling than that of the Queen's Bench would enable the original owner to repudiate the claim of the person holding the receipt (from a third person) on any rise of the market. The language must, however, be interpreted in connection with the whole transaction and with any custom properly connected with it. The decision is borne out by Dezell *v.* Odell, 3 Hill, 215. And this case sustains Knights *v.* Wiffen also upon the point of prejudice to the plaintiff. See also Leather Manuf. Bank *v.* Morgan, 117 U. S. 96; Dresbach *v.* Minnis, 45 Cal. 223; Gaff *v.* Harding, 66 Ill. 61; Dewey *v.* Field, 4 Met. 381; Chapman *v.* Shepard, 39 Conn. 413; Warren *v.* Milliken, 57 Maine, 97. Mr. Justice Blackburn, having stated the facts as above given, down to the reply of Wiffen to the station-master that he would place the barley on the line when the forwarding note arrived, said: 'What does that mean? It amounts to this, that Maris having given the order to enable Knights to obtain the barley, Wiffen recognized Knights as the person entitled to the possession of it. Knights had handed the delivery order to the station-master, and Wiffen when the document was shown to him said in effect, It is quite right; I have sixty quarters of barley to Maris's order; I will hold it for you, and when the forwarding note comes, I will put it on the railway for you. Upon that statement

In the case of Woodley *v.* Coventry,[1] cited by the learned judge, the change of position had been actual, not merely pre-

Knights rested assured; and Wiffen by accepting the transfer which had been informally addressed to the station-master bound himself to Knights. The latter accordingly, when he did not get the goods, brought an action of trover against Wiffen, saying as it were, You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse, it will be a conversion. And Wiffen now says, It is true, but I *do* refuse to deliver the barley. Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for you. I had no quarters belonging to Maris, for I never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris until I am paid the full price. No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain in solido, and no property passes. But can Wiffen here be permitted to say, I never set aside any quarters? As to that Woodley *v.* Coventry, 2 Hurl. & C. 164, is very much in point; with this difference, that there the plaintiff acted on the statement of the warehouseman, and altered his position by paying the vendee a part of the price, and so the doctrine of estoppel applied; which doctrine is that when one states a thing to another with a view to the other altering his position, or knowing that as a reasonable man he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement. Woodley had altered his position by paying part of the price, but Coventry did not know it. In Stonard *v.* Dunkin, 2 Camp. 344, it is patent that the defendant knew the money was paid. In Hawes *v.* Watson, 2 Barn. & C. 540, it appears that payment had been made, but the defendant did not know of it, although as a reasonable man he might have known it was likely. But in neither of those cases did the defendants know that money was *going* to be paid. In the present case the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that when he assented to the delivery order, the plaintiff as a reasonable man would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money. Very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief as a reasonable man that the property had been passed to him. If once the fact is established that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical with Woodley *v.* Coventry and Hawes *v.* Watson. It is to be observed, moreover, that the judgment of the court in Woodley *v.* Coventry did not rest on the fact of the payment of the price. It will be noticed there that although the fact did exist of payment of price, Martin, B. seems to found his decision on the *assenting to hold*, and the fact that when that assent was communicated to the plaintiffs they altered their position. In Gillett *v.* Hill, 2 Cromp. & M. 530, there was no payment of the price, and the Court of

[1] 2 Hurl. & C. 164.

sumptive. The plaintiffs brought trover for a quantity of flour in the possession of the defendants, one of whom was owner of a grain warehouse. One Clarke, who had purchased but had not paid for a quantity of flour of the defendants, applied to the plaintiffs for advances, and gave to them a delivery order on the defendants for a portion of the flour which he had purchased. The plaintiffs before consenting to make any advance on this order sent it to the warehouse with the inquiry whether 'it was all in order,' and received the answer, 'Yes.' Samples were then taken to the plaintiffs; and they thereupon made an advance of £950 to Clarke. Before the flour had all been delivered Clarke was declared a bankrupt, and the defendants refused to deliver any more to the plaintiffs; and their defence was that as the flour purchased by Clarke had never been separated from the bulk no property had passed. But the court held that they were estopped to set up this defence.

The case of Stonard *v.* Dunkin,[1] also cited by Mr. Justice Blackburn, was put on the ground of tenancy. In this case a warehouseman on receiving an order from a dealer in malt to hold it on account of the plaintiff gave a written acknowledgment that he so held it. It was contended for the defendants, assignees of the dealer, that by the custom of the trade a *remeasuring* of the malt was necessary to a transfer of the property, and that the dealer's bankruptcy intervened before this had been done; on this ground the assignees claimed the malt. But Lord Ellenborough said: 'Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, The malt is not yours, after acknowledging to hold it on his account. By so doing they *attorned* to him; and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title.'

Exchequer gave judgment against the wharfingers on the ground that they were estopped from denying the facts after the other party had altered his position, relying on their conduct when the delivery order was presented. In the present case the plaintiff altered his position, relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say, I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true.'

[1] 2 Camp. 344.

The case of Hawes *v.* Watson[1] was similar in facts; and Stonard *v.* Dunkin was cited in favor of the decision. The same doctrine was again maintained in Gosling *v.* Birnie,[2] and again put on the ground of attornment. This position, however, is entirely consistent with the presumption of damage. The plaintiff rests satisfied in the belief as a reasonable man that the property has passed to him; and he is prevented by the acknowledgment of the opposite party from taking measures to place himself in statu quo with the seller.[3] But this, though not untenable, is dangerous ground.

These cases suggest a question already adverted to, of the true ground on which to rest the right of one who has taken by purchase or assignment a bill of lading, warehouse receipt, or the like instrument. It has sometimes been considered that this is a phase of purchase for value.[4] That, however, appears to be straining a very characteristically marked doctrine, that purchase for value without notice cuts off equities; here there is no equity to cut off, except perhaps in the very broad sense of the law of bills and notes, in which mistake in regard to consideration is so treated. The safer ground to take is that the representation in question operates by estoppel; and then we have the question whether the estoppel is made out when the bill of lading or warehouse receipt is taken merely as collateral security for debt, without the surrender of any right. In New York, it seems, it would not be;[5] but the general tendency is towards the right of the creditor to the benefit of the acknowledgment. It is an exceptional case, however, to be justified only on the requirements of trade. Acting upon the representation should, in general, be more substantial.

Where it is plain that the representation *has* been substantially acted upon, there is of course no question (supposing the existence of other elements) that an estoppel arises. Thus, where an adjustment of losses between several insurance companies is agreed upon, and the insured makes settlement accordingly with

[1] 2 Barn. & C. 540.
[2] 7 Bing. 339.
[3] See also ante, p. 639.
[4] Ante, p. 475, note 3.
[5] 1 Bigelow, Law of Fraud, 405, 406.

one or more of the companies, the rest will be estopped in the absence of fraud to dispute their liability as adjusted.[1]

It is clear too that what may not under the circumstances have amounted to an estoppel for want of justifiable action upon the representation may become an estoppel by ratification or misleading acquiescence. Thus, it is laid down that if a party having an interest to prevent an act being done, as e. g. acting upon a mistaken statement of his, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and to the position of others as altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.[2]

Only the person to whom the representation was made or for whom it was designed can act upon and avail himself of it.[3] There has been some drifting, indeed, from the safe anchorage of the rule, in regard to the point stated;[4] but the better cases hold well to the position. An illustration may be seen in the case of Townsend Bank *v.* Todd, the facts of which have been stated on a preceding page.[5] One of the grounds why the defendant could not make out an estoppel against the plaintiff was that the statements in question had been communicated to her (the defendant) without authority from the plaintiff. A person who receives statements at second-hand, not intended for him, clearly has no right to act upon them.[6] Indeed, it is equally clear that a mere bystander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him;

[1] Fishbeck *v.* Phœnix Ins. Co., 54 Cal. 422.

[2] Lord Campbell in Cairncross *v.* Lorimer, 3 Macq. 827, 830, quoted by Harlan, J. in Leather Manuf. Bank *v.* Morgan, 117 U. S. 96, 113. See also Fountain *v.* Whelpley, 77 Maine, 132, and cases cited, in regard to making known one's rights after notice that a representation not intended to be binding has been acted upon. Ante, p. 637, note.

[3] Durant *v.* Pratt, 55 Vt. 270; Townsend Bank *v.* Todd, 47 Conn. 190; Kinney *v.* Whiton, 44 Conn. 262; Peek *v.* Gurney, L. R. 6 H. L. 377; Swift *v.* Winterbotham, L. R. 8 Q. B. 244.

[4] See Mitchell *v.* Reed, 9 Cal. 204; Horn *v.* Cole, 51 N. H. 287. Both cases are justly criticised in Kinney *v.* Whiton, 44 Conn. 262.

[5] Ante, pp. 578, 579.

[6] Kinney *v.* Whiton, 44 Conn. 262; Mayenberg *v.* Haynes, 50 N. Y. 675; Morgan *v.* Spangler, 14 Ohio St. 102.

and so it has been decided.[1] If, however, the declaration was intended to be general, then it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it.[2] This should be the limit of the law;[3] more than this would be to make a man responsible for an act not his own or that of his agent. But some cases have gone, and some have been inclined to go, further.[4] It may make a difference too whether the action taken upon the representation be taken as the representation of the party who started it, or as the representation of him who has repeated it. In the latter case he who repeated the statement, if not an agent of the one who started it, is, it seems, alone liable if he repeated it as his own, though the party who started it may have intended it for any one to act upon, who would deal with *him*.[5]

The fact should be remembered that this estoppel by conduct, when fully made out, operates by nature (i. e. whenever it can so operate), like all other estoppels, specifically; it gives to the party entitled the rights he would have against the one estopped supposing the representation true.[6] Hence if, by reason of the better title of a third person, the party misled by the false representation has to lose what he obtained under that representation, he will stand upon a footing represented by the

[1] Kinney *v.* Whiton, 44 Conn. 262, 270.

[2] Kinney *v.* Whiton, supra; Quirk *v.* Thomas, 6 Mich. 78.

[3] Kinney *v.* Whiton, supra.

[4] Mitchell *v.* Reed, 9 Cal. 204; Horn *v.* Cole, 51 N. H. 287. The sufficient answer is to be found in Kinney *v.* Whiton. See also Peek *v.* Gurney, L. R. 6 H. L. 377, and Swift *v.* Winterbotham, L. R. 8 Q. B. 244, by inference equally strong answers. 'It seems to us to be an unsafe doctrine to adopt, that a person who gets at second-hand a declaration not intended for the public and not intended for him, may act upon it as safely as the person to whom the declaration was addressed and for whom alone it was intended. Where the declaration was intended only for the person to whom it was addressed, the party making it has assumed no obligation to any other person. A bystander who casually overhears a conversation has no right to appropriate to himself, without further inquiry, what was intended for another.' Granger, J. in Kinney *v.* Whiton, a case of a bystander. Analogy might be found, if needed, in the familiar rule in slander and libel, that the first publisher is not liable for unauthorized repetitions.

[5] Peek *v.* Gurney, L. R. 6 H. L. 377; Swift *v.* Winterbotham, L. R. 8 Q. B. 244. These are cases of actions for deceit.

[6] Grissler *v.* Powers, 81 N. Y. 57.

specific right of the estoppel. Thus, if the false representation is made on the sale of a security which the seller did not own, the buyer's rights are what they would have been had there been no misconduct. They are not limited to a recovery of the consideration paid, but the purchaser will be entitled to recover what he would have received had the representation been true.[1]

Finally, this estoppel, arising as it does from misconduct, is not mutual, like other estoppels, and cannot be used against the party in whose favor it has arisen. It is held that a mortgagee is not estopped to deny that his mortgage debt has been paid by receiving from the mortgagor a security upon the representation that that is sufficient to meet the debt, but may show that it turned out insufficient.[2] Such a case would be an estoppel upon the mortgagor if he had represented the security to be good, whereas it turned out bad.

[1] Grissler *v.* Powers, 81 N. Y. 57, explaining Payne *v.* Burnham, 62 N. Y. 69. See also Fall River Bank *v.* Buffinton, 97 Mass. 498.

[2] Shepherd *v.* May, 115 U. S. 505.

CHAPTER XIX.

NEGLIGENCE WITHOUT REPRESENTATION.

NEGLIGENCE in connection with false representations has already been considered; we have seen that in certain cases the negligence may supply the place of knowledge of the facts,[1] and that it may generally supply the place of intention as touching the mode or the circumstances in which the representation was made.[2] It has also been intimated that an estoppel by conduct may arise out of negligence in cases in which there has been no communication between the parties and no representation or anything equivalent to a representation, in the proper sense of that term, by the party estopped.[3] The class of cases here referred to, it will be observed, will exclude all such cases as those of negligently 'standing by' and seeing one's rights interfered with as the rights of another; for there, though no language may have been used by the negligent party, the equivalent of a representation for the purpose of estoppel is left, as has been shown on a preceding page,[4] and as would be seen by suggesting to the party about to be misled the existence of the right in question. What passed at the time, with the standing by, practically negatived that.

It is clear, however, that cases of estoppel arising out of negligence without a representation must be uncommon. They cannot fall within the proposition of Mr. Justice Brett (now Lord Esher) in the well-known case of Carr *v.* London & North-western Ry. Co.;[5] which in substance was, that one who has led another to his prejudice into the belief of a fact by conduct of culpable negligence calculated to have, and the proximate cause of, that result, will be estopped to deny the existence of

[1] Ante, pp. 612 et seq.
[2] Ante, pp. 612, 632.
[3] Ante, pp. 556, 612.
[4] Ante, p. 584.
[5] L. R. 10 C. P. 307, 313.

the fact;[1] they cannot fall within that proposition, for the proposition itself shows that a representation (by conduct) has been made. Estoppel by negligence has sometimes been thought to cover cases like Young *v.* Grote,[2] in which a man's clerk alters a completed[3] check or a promissory note of his employer, by writing in words in a space left blank by the signer. But Young *v.* Grote, assuming that it may be considered sound, stands upon ground of its own. Indeed, the ground seems to have been cut from under it altogether by the very just proposition that forgery is not a probable result of the repose of confidence, — a point to be referred to again presently.[4]

The cases which may be regarded as authority do not afford us the advantage of any positive illustration of an estoppel by negligence without representation. They only go so far as to say that unless the negligence is in the transaction itself which is supposed to raise the estoppel, or in immediate connection with the transaction, there can be no estoppel. Now, in ordinary cases negligence in the transaction itself will amount to a representation, for the parties are face to face; and in such a case neglecting to state a fact has the effect naturally of denying its existence.

There is ground for thinking, however, that where the negligence is 'in immediate connection' with the transaction, there may be negligence which cannot be considered as having the effect of a representation, and yet may form the basis of an estoppel. Let it be supposed that a man has been fixed with constructive notice, which by reason of his negligence has not become knowledge to him, of the existence of some right in his favor; that this right is to his knowledge about being disposed of by another as that other's property; and that it is so disposed of to a purchaser for value without notice of the right, and in the absence, of the negligent party. Here would be a case of negligence which could hardly be treated upon the footing of a repre-

[1] Ante, p. 570, note, 6.
[2] 4 Bing. 253.
[3] See pp. 494, 495.
[4] See Vagliano *v.* Bank of England, 22 Q. B. D. 103, affirmed, 23 Q. B. D. 243, on appeal; and see the cases infra of fraudulent acts of agents, especially Merchants of the Staple *v.* Bank of England, infra, p. 658, per Bowen, L. J.

sentation;[1] but would not an estoppel arise, supposing all the other elements of it present? The negligence would seem to possess all the characteristics of negligence having legal consequence; what here follows will bear this out.

Where the estoppel turns upon negligence, a consideration of first importance arises, to wit, whether the conduct of the party alleged to be estopped was the proximate cause of the change of position by the party claiming the existence of an estoppel. It need hardly be said that no such question can arise in cases in which the one party really intended that the other should act as he has done; enough if the intention has been acted upon while it is still living, by the person actually or presumably meant; enough that the intention has been accomplished. The result has been directly effected — that is the point — by the party who practised the deception. But if, instead of intention, there is only negligence, then it must be seen, by close scrutiny, whether the result has been thus directly effected, for negligence in itself does not point to any particular result.

The principle in regard to negligence having legal consequences appears to be this: 1. There must have been a failure to exercise that care, prudence, or diligence which a man of average care, prudence, or diligence would exercise in the case. 2. And that general proposition means specifically, (*a*) that the negligent person must at the time owe some duty either to the person affected by the alleged negligence or to the public of which he is one;[2] and (*b*) that the result, at least in the law of estoppel, has come about in or in immediate connection with the negligent act or omission.[3] Of the general proposition it is

[1] There is a difference obvious enough between the case of silence by a man present and silence by a man absent, on the point of a representation. It cannot be said that anything equivalent to a representation is left in the latter case, when there is no reason for the party acting to expect the absent party to be present; for though the mind, receiving only the impressions of the negotiation, adverts to the blank part of the picture (ante, p. 584), and so might at first vaguely infer that no one else in all the world besides the other party to the negotiation was interested, any such inference would at once be vitiated by the reflection attending it that absent persons could not speak.

[2] Swan *v.* North British Co., 2 Hurl. & E. 175, 182, Blackburn, J. in Exch. Ch.; Arnold *v.* Cheque Bank, 1 C. P. D. 578.

[3] Ibid.; Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389; Coventry

not necessary to speak; it would not now be questioned. Of the specific propositions something must be said, by way of confirmation and example.

The cases just cited will serve the purpose, at least for the second specific proposition, which is the one calling particularly for consideration. The first one is fairly obvious. No liability is incurred by A towards B if A is under no duty to B to refrain from negligence; negligence in itself, though followed by damage, is not a wrong. The negligent party must owe a duty to the person who suffers the damage. B and C may suffer damage in the same way, and on the same occasion, from the negligence of A, yet A may be liable to the one and not to the other, and that though no contract enters into either's case. Thus, A owes a duty to keep his premises in order, in favor of a customer, e. g. B; he owes no duty to keep them in order towards a trespasser, e. g. C. That is, B would have a right of action against A for negligence in a state of things in which C would not. The principle is equally applicable to cases of estoppel.

Then we have to deal with the second of the two specific propositions; this requires the result to have come about in or in immediate connection with the negligence,[1] thereby defining, for the purpose of this estoppel, the term 'proximate cause.'[2] It must be conceded that the rule has not always been so stated even by judges of high reputation. Thus, in Swan *v.* North British Co.,[3] a case which has been much cited, Mr. Baron Wilde in the Court of Exchequer laid down the rule in substantially the following terms: If A has led B into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and B has acted upon that belief to his prejudice, A shall not be heard against B to show that that state of facts

v. Great Eastern Ry. Co., 11 Q. B. D. 776, C. A.; Merchants of the Staple *v.* Bank of England, 21 Q. B. D. 160, C. A.; Vagliano *v.* Bank of England, 22 Q. B. D. 103, 117; 23 Q. B. D. 243, C. A.

[1] The proposition was first laid down by Mr. Baron Parke in Bank of Ireland *v.* Evans Charities, supra, and has since become classic. The language there used was this: 'The negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself.'

[2] On that term see especially Seton *v.* Lafone, 19 Q. B. D. 68, C. A., affirming 18 Q. B. D. 139; infra, p. 658.

[3] 7 H. & N. 603; 2 H. & C. 175.

did not exist. This, it will be noticed, is a sweeping proposition of law, fixing an estoppel upon A even where his negligence was made productive of mischief by a third person, if only it was 'calculated' to effect the result. And this the Exchequer Chamber, in the same case, held not to be good law, and qualified the proposition by declaring that the neglect must be in the transaction itself and the proximate cause of leading to the change of position.[1]

The case itself should be stated, to make clear the rule finally declared. The facts in substance were these: The plaintiff, wishing to sell shares of his in the A Company, and also owning but not intending to sell shares in the B Company, was induced by his broker to give to him, for the purposes of the sale, ten blank transfers signed and sealed by himself the plaintiff. The broker used eight of the transfers as desired, but then fraudulently filled out and forged attestations to the other two, as transfers of stock in the *B* Company, and having stolen the certificates delivered both the transfers and the certificates to bona fide purchasers for value. These purchasers were now registered in place of the plaintiff; and the question was whether the plaintiff, by reason of giving the blank transfers to the broker, and so facilitating the fraud committed, had estopped himself from claiming the stock. The Exchequer Chamber held that he had not, on the ground that his negligence was not the proximate cause of the change of position; it was not in the transaction itself or in immediate connection with it.

In Arnold *v.* Cheque Bank[2] it appeared that the plaintiffs in New York, wishing to send money to A in London, bought a draft on London payable to themselves, which they indorsed specially to A's order, and enclosed it in a letter to be posted in the usual way from their house. The letter was stolen by one of their servants and the indorsement of A forged by the thief, who now procured the defendants to present the draft and obtain for him the money in London. The plaintiffs sued for money had and received, and recovered, against the attempt of the defendants to maintain that the plaintiffs were estopped because apart from facilitating the theft they had not conformed to

[1] 2 Hurl. & C. 175, 182. [2] 1 C. P. D. 578.

an alleged invariable custom to advise the drawees of the draft by the same or the next mail. The ground taken by the court was the same as that above mentioned; the negligence was not in or immediately connected with the transaction in question, and hence was not the proximate cause of the change of position.

In Merchants of the Staple *v.* Bank of England,[1] a case decided by the Court of Appeal, the plaintiffs claimed the value of certain stock. The stock had been transferred by the fraudulent act of their clerk, in whom they had long reposed unlimited confidence. They had always left their seal with him; and on this occasion he had affixed it to powers of attorney under which the stock had been sold by the defendants, the clerk appropriating the proceeds. It was held that, assuming the plaintiffs to have been negligent,[2] their negligence was not the proximate cause of the defendants' act; the negligence was not in the transfer or in immediate connection with it. 'The proximate cause,' said Lord Justice Bowen, 'was the felony and crime' of the clerk, 'and it cannot be said that the felony was either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs.'

The same principle is laid down again in and illustrated by a case in which there was a representation, — the case of Seton *v.* Lafone,[3] in which the Court of Appeal affirmed the ruling of Mr. Justice Denman.[4] In 1875 goods were stored by brokers with wharfingers, for which a delivery warrant was issued. Ten years afterwards the goods were delivered by negligent mistake, by servants of the defendant who had bought the wharf and business, to persons entitled to other goods; of which mistake the defendant did not become informed till later. In January, 1886, the warrant which had been negotiated was in the hands of a third person. The defendant during that month wrote

[1] 21 Q. B. D. 160.

[2] Clearly such conduct could not be negligence as matter of law. Comp. Fine Art Soc. *v.* Union Bank, 17 Q. B. D. 705, C. A., where it is held that there can be no negligence in allowing one's clerk to take to the bank for deposit money orders (which he there deposits to his own credit), at least if the employer has no knowledge that his clerk has an account there; and probably without any such qualification.

[3] 19 Q. B. D. 68.

[4] 18 Q. B. D. 139.

letters to the plaintiff, who had bought the business of the brokers and carried it on in their names, informing him as presumably interested in the goods that the goods were in the warehouse, that no rent had been paid upon them for several years, and that if the rent due was not paid, the goods would be sold. Thereupon the plaintiff, without replying, bought the warrant and called for the goods, when the mistake was discovered.

The action was for conversion, and the court held that the defendant was estopped, by reason of his negligent representation, to deny that he had the goods, on the ground that his negligence was the proximate cause of the plaintiff's buying the warrant, within the meaning of the rule under consideration; it was deemed to be in or in immediate connection with the transaction. It was held to be unnecessary that the person making the representation should intend that the other should act upon it in any particular way.[1]

[1] Lord Justice Fry: 'The inquiry whether the statement was the proximate cause does not depend on the intention of the party making it. In order to ascertain whether the statement by one person has brought about the action of the other, you must look at the condition of mind and circumstances of the person to whom the statement was made, not of the person who made the statement.' But his lordship admitted that the case had given him trouble.

CHAPTER XX.

WAIVER.

BESIDES the cases of negligence just considered, there are other estoppels, so called, growing out of conduct that cannot be considered cases of representation in any legitimate sense of that term. The cases now referred to are cases of the waiver of rights, causing a change of position.[1] The waiver, if valid and complete, is sometimes said to 'estop' the owner of the right to assert it.[2] Thus, where by the course of conduct of one party to a contract, entitled to the performance of certain terms or conditions thereof, the other party has been led to believe, as a man of average intelligence, that such performance will not be required, until it has become too late to perform, or until to insist upon performance would work material injustice, the person who has so conducted himself is barred from asserting the right he had. It appears to be little if anything more than giving to such cases a new name to call them estoppels. The estoppel, unlike that by misrepresentation, does not rest upon ignorance of the facts by the party entitled to the benefit of it.

Frequent illustrations of the estoppel in question are to be found in cases of actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the assured to believe, until too late, that a requirement of the policy, as e. g. in regard to the proofs of loss or the prompt pay-

[1] That kind of waiver which consists merely in renouncing some right, or in ratifying what one might repudiate, is, certainly, no estoppel, though it has been called such, as in Eagan Co. *v.* Johnson, 82 Ala. 233, in the headnote to Wallace *v.* Minneapolis Elevator Co., 37 Minn. 464, and in other cases. The kind of waiver capable of being described as an estoppel should have the marks of an estoppel, by causing the innocent party to forego some right or otherwise to change his position. Other waivers are more properly cases of election; as to which, see chapter 21.

[2] See e. g. Ganong *v.* Green, 64 Mich. 488, 493; Insurance Co. *v.* Eggleston, 96 U. S. 572, 577, infra.

ment of the premium or of a premium note, will not be required. If the assured as a sensible man has really been misled, it would be a fraud upon him to insist upon the term or condition forborne. The Supreme Court of the United States has expressed the law of the subject in a formal rule, as follows: Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon a forfeiture which by the express terms of the contract might be claimed.[1] And the rule may be extended to cases generally of agreements, actual or virtual, for the waiver by one party to an obligation or engagement of the stipulated terms of performance by the other.[2]

Such agreement, declaration, or course of action, if in parol, must of course, in the case of a written contract, be *after* the execution of the writing, otherwise it would be subject to the rule excluding parol evidence to vary a written contract;[3] though there may be a waiver of preliminary facts, such as irregularities pertaining to the making of the contract, contemporaneous with the execution of the same. Thus, if an execution debtor induce one to purchase his land at the sale, it is held that he will be estopped to allege irregularities therein to defeat the purchaser's title.[4] Moreover, in order to be effectual against the other party the agreement or course of action must have been made with knowledge, actual or presumptive, of the essential facts upon which it is founded. Thus, in the case of a life

[1] Insurance Co. *v.* Eggleston, 96 U. S. 572; Insurance Co. *v.* Norton, ib. 234; Phœnix Ins. Co. *v.* Doster, 106 U. S. 30, 35; Insurance Co. *v.* Wolff, 95 U. S. 326. See Travellers' Ins. Co. *v.* Edwards, 122 U. S. 457, that conduct of an insurance company may supersede terms of the policy in regard to agency. If there has been no acting upon the supposed waiver, there will be no estoppel. Henry *v.* Gilliland, 103 Ind. 177, 180.

[2] See Longfellow *v.* Moore, 102 Ill. 289; Hooker *v.* Hubbard, 102 Mass. 239, 241; Giddens *v.* Crenshaw, 74 Ala. 471; Daniels *v.* Edwards, 72 Ga. 196 (construction put upon a lease by one party and acted upon with consent of the other), Keyes *v.* Scanlan, 63 Wis. 345 (abandonment of homestead right).

[3] Thompson *v.* Insurance Co., 104 U. S. 252; Insurance Co. *v.* Mowry, 106 U. S. 544. See also Martin *v.* Jersey City Ins. Co., 44 N. J. 273; Castner *v.* Farmers' Ins. Co., 50 Mich. 273; Longfellow *v.* Moore, 102 Ill. 289.

[4] Youngblood *v.* Cunningham, 38 Ark. 571.

insurance contract, if the underwriter has waived even expressly a stipulation against residence in certain regions, the waiver presupposes that the assured has not already died there,[1] and indeed that he has not already been there, unless the waiver was retroactive.[2]

A single case out of many that might be referred to may be presented in illustration of the foregoing rule as applied to waivers of defects in the preliminary proofs of loss under an insurance policy. The defendants being sued for a loss under a fire insurance policy issued by them, raised the objection of the insufficiency of the proofs of loss. The judge instructed the jury that though the defendants' by-laws and the conditions of the policy required certain preliminary proofs and notices, to be given in a certain manner, and with certain particulars and details, and certain preliminary proofs and notices were given not containing all the requisites, still, if after receiving the same the defendants' officers examined the premises, and had interviews with the plaintiff before the expiration of the time for giving such notices, and neither then nor afterwards made objection to the form or sufficiency of the proofs and notices, but put their refusal to pay on other grounds, such conduct would now estop the defendants to set up the insufficiency of the same. And this instruction was sustained on appeal.[3] Indeed, it appears to be true that if an underwriter put his objection to paying on some particular ground, such as the defectiveness of the proofs in some particular mentioned by him, he will be estopped thereafter to raise other objections of the same nature, open to him before.[4]

Whether this can be considered as a special example of a wide rule is not clear; probably it is not. It would not be safe to affirm that if a party to a contract which had not as yet been fully performed by the other party in two or more particu-

[1] Bennecke *v.* Insurance Co., 105 U. S. 355.

[2] Insurance Co. *v.* Wolff, 95 U. S. 326.

[3] Blake *v.* Exchange Ins. Co., 12 Gray, 265.

[4] Cannon *v.* Home Ins. Co., 53 Wis. 585; Ætna Ins. Co. *v.* Tyler, 16 Wend. 401; Miller *v.* Eagle Ins. Co., 2 E. D. Smith, 268; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136; Clark *v.* New England Ins. Co., 6 Cush. 342; Heath *v.* Franklin Ins. Co., 1 Cush. 257.

lars should, with knowledge of such fact, object to the non-performance of one, he might be considered as having waived the non-performance of the rest. He might have special reason for raising the particular objection without having it supposed that he did not intend to require performance of the other terms of the contract. A man does not lose his rights without intention or facts fairly equivalent to intention. Thus, it is held that an underwriter is not estopped to assert a breach of warranty in the policy by stating another particular ground of defence, unless the act, done with knowledge of such breach, conveyed a reasonable belief that the breach of warranty would not be alleged, and so actually misled the assured.[1]

In the case of Tufts *v.* McClure[2] it appeared that goods had been bought upon condition that they should be delivered within a reasonable time. Upon tender by the seller the buyer objected to them for poor quality. The seller now sued for breach of the contract of purchase, and it was held that the buyer might show that the goods were not tendered within reasonable time. But in that case it is obvious that the objection first made had nothing to do with the delay of tender. The estoppel, it is certain, cannot arise in the absence of statute[3] unless the party against whom it is alleged caused the omission of performance.

The rule of estoppel has been applied to the case of a discontinuance by an underwriter of an agency at a particular place, where the assured had previously made payments of premium, followed by notice of different places where payment was to be made and was made in subsequent years, and then by an omission of such notice, without knowledge on the part of the assured where to pay, and consequent failure to pay at the stipulated time. It was held under these circumstances that the assured had reasonable ground to expect the customary notice, and that the underwriter was estopped to deny liability on the policy.[4] Giving notice a single time, however, would not of itself

[1] Devens *v.* Mechanics' Ins. Co., 83 N. Y. 168. See Schmidt *v.* Mutual Ins. Co., 55 Mich. 432.

[2] 40 Iowa, 317.

[3] See Easton *v.* Wareham, 131 Mass. 10, 12; ante, p. 664, note, under statute.

[4] Insurance Co. *v.* Eggleston, 96 U. S. 572. See also McCraw *v.* Old

bind the underwriter to continue to give notice.[1] Unless there is a valid agreement or duty to do so, nothing short of a settled practice of notifying the plaintiff would have that effect;[2] though if an underwriter should put an end to an agency where the assured has dealt, or if the agency for any reason should cease, except by reason of war or the like, it would probably be necessary to notify the assured where to pay.[3] The rule that acts of an underwriter's agent in writing down statements of his own, made for the assured, bind the underwriter in the absence of fraud on the part of the assured, preventing the underwriter from alleging a breach of warranty, has also been referred to estoppel in pais.[4]

The question to be considered in such cases, it will be seen, is whether the conduct of the one party has had a natural tendency to prevent the other from doing what he has undertaken to do and has not done. Where the conduct in question consists in some act done by the party to be estopped, it is often difficult enough to determine whether there has been a misleading; where that conduct consists only in silence, the case is so very difficult that courts continually disagree in regard to its effect. Some courts say in regard to insurance cases that for an underwriter to keep silent when proofs of loss are furnished him which are not in accord with the requirements of the contract of insurance is not misleading;[5] for, assuming that

North Ins. Co., 78 N. Car. 149; Chicago Ins. Co. *v.* Warner, 80 Ill. 410; Aurora Ins. Co. *v.* Kranich, 36 Mich. 289; Browning *v.* Crouse, 40 Mich. 339; Lyon *v.* Travellers' Ins. Co., 55 Mich. 141. But repeated payments by one town to another, even without denial of liability, for the support of a pauper, are only evidence of the pauper's settlement; they do not make an estoppel. Norridgewock *v.* Madison, 70 Maine, 174. See Ellsworth *v.* Houlton, 48 Maine, 417; Weld *v.* Farmington, 68 Maine, 301. It is, however, held under statutes of Massachusetts, that if a town notified by another town that A is one of its necessitous poor make no answer whatever, it will be estopped to deny the settlement, though not to deny that A is in need of relief. Easton *v.* Wareham, 131 Mass. 10, 12; New Bedford *v.* Hingham, 117 Mass. 445.

[1] Insurance Co. *v.* Mowry, 96 U. S. 544. See Plott *v.* Chicago R. Co., 63 Wis. 511; Sweetser *v.* Odd Fellows Assoc., 117 Ind. 97; that occasional acts do not create a duty to continue them.

[2] Phœnix Ins. Co. *v.* Doster, 116 U. S. 30.

[3] Ins. Co. *v.* Eggleston, 96 U. S. 572.

[4] Miller *v.* Phœnix Life Ins. Co., 107 N. Y. 292, 301; Baker *v.* Home Life Ins. Co., 64 N. Y. 648; Insurance Co. *v.* Wilkinson, 13 Wall. 222; and many other cases.

[5] Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25; Keenan *v.* Missouri Ins. Co., 12 Iowa, 126.

the terms of the requirement are clear, the assured knows what he must do. The underwriter, according to this view, has the right to say, 'Do what you have agreed to do, and without my help, for that I have not agreed to give.' Other courts, treating the position of the underwriter as peculiar and imposing upon him a special duty towards the assured, consider that, in view of his more intimate knowledge of what is required, he ought to object when the proofs of loss are produced, if at all, so as to give the assured opportunity to make them good.[1]

Certain cases in equity of expenditures made upon another's estate for the benefit of the party claiming the estoppel may be referred, perhaps, to the present subject.[2] Thus, if without deed the owner of an estate give to another permission to expend money thereon, or encourage another to expend money upon it in reasonable reliance upon a claim in derogation of the owner's right, and knowing or being bound to know that work is going on to his prejudice,[3] do not interpose to prevent carrying out the same, he will not be permitted, on revoking his license as not binding by virtue of the Statute of Frauds, to appropriate to himself alone the benefit of substantial improvements,[4] or, it

[1] Unthank *v.* Travelers' Ins. Co., 4 Biss. 357; s. c. 19 Myers Fed. Dec. 816 (vol. on Insurance), and cases cited. Comp. the statutory cases of Easton *v.* Wareham, 131 Mass. 10, 12; New Bedford *v.* Hingham, 117 Mass. 445; supra, note.

[2] See the replevin case of Fowler *v.* Parsons, 143 Mass. 401. At p. 408 Mr. Justice Field says: 'If the plaintiffs or their agents knew or believed that Lambert, in good faith, claimed the goods as consignee of a supposed owner other than themselves, and they, believing themselves to be the owners, and intending to claim the goods, stood by and permitted him to pay the duties without disclosing their claim, and with the intention of replevying the goods after the duties were paid, we think that Lambert was equitably entitled to have the amount of the duties paid to him before the plaintiffs were entitled to possession, and that he thereby acquired an equitable lien upon the goods.' The following cases were cited: Willmott *v.* Barber, 15 Ch. D. 96; Ramsden *v.* Dyson, L. R. 1 H. L. 129, 141, 168, 170; Rennie *v.* Young, 2 De G. & J. 136; Wendell *v.* Van Rensselaer, 1 Johns. Ch. 344; Niven *v.* Belknap, 2 Johns. 573; Pickard *v.* Sears, 6 Ad. & E. 469; Gregg *v.* Wells, 10 Ad. & E. 90; Dewey *v.* Field, 4 Met. 381; Hinckley *v.* Greany, 118 Mass. 595; Griffin *v.* Lawrence, 135 Mass. 365.

[3] See Breeze *v.* Brooks, 71 Cal. 169, 182.

[4] Ramsden *v.* Dyson, L. R. 1 H. L. 129, 142, 169; Grider *v.* Driver, 46 Ark. 109; Montgomery *v.* Wasem, 115 Ind. 343; Carolina R. Co. *v.* McCaskill, 94 N. Car. 746.

seems, to recover damages for anything done strictly under the permission.[1] And assuming that the owner is perfectly aware of all the facts, including his own rights, it matters not that the party expending the money knows that he is expending it on the other's estate where permission to do so has been actually or virtually given;[2] for the case is one of actual or tacit agreement to forego a known right. After the licensee has proceeded in good faith to do nothing more than he has received express permission to do, it would be contrary to justice to permit the licensor both to revoke his permission, and to appropriate the work done on his land.[3]

Some of the courts, indeed, deny the right of the (parol) licensor even to revoke the license, after outlay under it; resting the case on the ground of estoppel in pais, or treating the situation as equivalent to part performance of a parol *agreement* for the sale of an interest in real estate.[4] But the better view, in presence of the Statute of Frauds, appears to be that, so far as the question of further enjoyment is concerned, the license may be revoked, though no action can be maintained against the

[1] Griffin *v.* Lawrence, 135 Mass. 365; Hedgepeth *v.* Rose, 95 N. Car. 41; Brooks *v.* Curtis, 4 Lans. 283; s. c. 50 N. Y. 639; Hyde Park *v.* Borden, 94 Ill. 26; Wilmington Mining Co. *v.* Allen, 95 Ill. 284; Graw *v.* Bayard, 96 Ill. 146; Dunks *v.* Fuller, 32 Mich. 242; Wilbur *v.* Goodrich, 34 Mich. 84; Fremont Ferry Co. *v.* Dodge Co., 6 Neb. 18; Groton Bank *v.* Batty, 30 N. J. Eq. 126; Holmes *v.* Steele, 28 N. J. Eq. 173; First National Bank *v.* Hammond, 51 Vt. 203; McLean *v.* Dow, 42 Wis. 610; Baker *v.* Humphrey, 101 U. S. 494; Malley *v.* Thalheimer, 44 Conn. 41; Miller *v.* Brown, 33 Ohio St. 547; Alabama R. Co. *v.* South Alabama R. Co., 84 Ala. 570; Grider *v.* Driver, 46 Ark. 109.

[2] This, it will be seen, is not the case of rights acquired in ignorance of a boundary or of a title. See ante, pp. 586 et seq., for that. The rule as stated in Schaidt *v.* Blaul, 66 Md. 141, 148, quoted from Casey *v.* Inloes, 1 Gill, 502, is an example of the latter case, the familiar case of 'standing by.' That differs radically from license.

[3] Ante, p. 586; Ramsden *v.* Dyson, L. R. 1 H. L. 129, 140; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; s. c. 46 Mich. 278; Griffin *v.* Lawrence, 135 Mass. 365; Swartz *v.* Swartz, 4 Barr, 353; Cumberland R. Co. *v.* McLanahan, 59 Penn. St. 23; Sheffield *v.* Collier, 3 Kelly, 82; Cook *v.* Pridgen, 45 Ga. 331; Lane *v.* Miller, 27 Ind. 534; Wilson *v.* Chalfant, 15 Ohio, 248; Moses *v.* Sanford, 2 Lea, 665. The licensor may be estopped by his conduct in certain cases to object to the continuance of the work, as where irreparable injury would result, and yet permitted to recover damages. Logansport *v.* Uhl, 99 Ind. 531, 540.

[4] See the cases cited in Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 467; St. Louis Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384, 393; Fargis *v.* Walton, 107 N. Y. 398, 403.

licensee for what he has been induced or led to do. 'Volenti non fit injuria.'

Another example of this sort of estoppel may be seen in Hope *v.* Lawrence.[1] In this case the defendants were instructed, according to the plaintiff's testimony, to sell certain gold of his in their possession if it reached a premium of 217 per cent on a certain day. It did reach that point and was very firm at the time, and the defendants thought best not to sell under the circumstances, and so stated in answer to the plaintiff's inquiry on the next day, on the morning of which gold had advanced to 220. Two or three days later, gold having in the mean time fallen below 217, the plaintiff wrote to the defendants, 'I took a note of your reply [above mentioned], and determined to wait the future course of the market before writing to you.' The price of gold kept falling for several days, and the defendants sold it at 207¾ premium. The plaintiff now sought to hold the defendants for their failure to sell at the time first mentioned. The court, however, held that he was estopped, his conduct being deemed misleading.[2]

[1] 50 Barb. 258.

[2] 'The effect of the omission of the plaintiff,' said Leonard, P. J. 'when he inquired the next day of the defendants if they had sold, to notify them that his instructions were absolute to sell (*a*) if the price reached 217, was to put them into a feeling of security and involve them in further loss if the price of gold continued to decline. The whole risk of the market was on them, while the plaintiff enjoyed the advantage to accrue in case the price advanced up to or above the limit of 217. The plaintiff was aware of this if he had given absolute instructions to sell at a price which the market had touched. His letter shows that he knew precisely how the price had advanced, and that he intentionally remained silent to see how the market would fluctuate after that. Had he then stated the position now claimed in this action, the defendants might have closed the gold transactions at 215½, the then market price, being only 1½ per cent below the plaintiff's limit, and involving a loss of $75 only. What the market price was on the 30th of January, when the plaintiff advised the defendants of his claim on them, does not appear; but on the 4th day of February, when it was sold, the price appears to have fallen to 207¾, the price realized. The defendants by the silence of the plaintiff had no opportunity to elect whether to hold or to sell the gold of the plaintiff then in their hands at their own risk as to the price, without the smallest chance of realizing any benefit for themselves, if the position of the judge at the trial is correct. But in my opinion what has been remarked above as to the practical effect upon the rights of the defendants arising out of the silence of the plaintiff when he should have spoken

(*a*) The defendants claimed that the instructions were not positive.

The binding force of a dedication of land to public uses by way of imperfect gift, or of acquiescence in changes of position due to supposed gift, is sometimes put upon the ground of estoppel.[1] This too is only a recent application of that term to a new subject; and whether there is any significance in it, or whether it is only a term of convenience, is not clear. The only point in applying the term 'estoppel' to the case is that the right acquired, if at all, by the public is a right to the use of the land specifically, and not a right merely in the alternative to damages, subject to the will of the late owner to revoke a gift at first imperfect.

It seems that in any case of dedication by gift the action of the public should be reasonably prompt. The gift is not to be taken as absolute and irrevocable as soon as made. When a landowner sets apart portions of his plat for public purposes, it is done with the expectation that the use of such portions for those purposes will be advantageous to the rest of the property, or to the original proprietor. He has a right to expect that within a reasonable time the land will be put in condition to subserve those uses. If given for public buildings there must be some reasonable assurance that they will be built; and if for ornamental purposes, that it will be made available for those. He cannot be bound to wait and abstain indefinitely from the use of his property upon the chance that some time or other, in the remote future, the public use may be secured. And his efforts to induce such acceptance and use cannot properly be regarded as anything more than repetitions and continuances of

establishes that the plaintiff is estopped from inflicting upon the defendants any damage for the subsequent depreciation in the price of gold coin. The plaintiff should be held to assume all the risk of further depreciation when he saw that the defendants were resting under the impression that they had missed the market by an error of judgment. He asked the reason why the defendants had not sold, and was told that the market looked strong when it was about 217, and thereupon they did not sell. It was evident to the plaintiff from this answer that the defendants were acting on their discretion.'

[1] See Baker *v.* Johnson, 21 Mich. 319; Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246; Beatty *v.* Kurtz, 2 Peters, 566; Hunter *v.* Sandy Hill, 6 Hill, 407. These cases show that a dedication may arise out of the conduct of the owner of land, followed by acts of others in reasonable reliance thereon. For a converse case, of abandonment of a street by a municipality, put upon the same ground, see Lee *v.* Mound Station, 118 Ill. 304.

his offer, requiring some responsive action. The public can only bind the landowner by acting upon his dedication before he has an equitable right to withdraw it.[1] On the other hand, merely permitting owners adjoining a street to enclose a portion of it for even fifteen years will not estop the public to claim its rights therein, if nothing has been done by the municipality to induce others to act upon the belief of abandonment.[2]

In like manner, payment of a tax for five years, illegally assessed, and participating in an election at which a subscription for a railroad was voted, followed by issue of bonds in payment, will not estop the people of the municipality to set up the illegality of the tax.[3] Indeed, evidence of passive acquiescence alone within the period of limitation, when not fraudulent or misleading, cannot have the effect of taking away a man's property; acquiescence, unlike estoppel, is, it must be remembered, only a fact tending to establish a right.[4] And the same is probably true of waiver, though in the case of waiver the other facts necessary to the right are more commonly present.

It should be clearly apprehended of the entire class of cases now under consideration that the conduct of the party against whom the estoppel is alleged, whether that conduct be misleading silence or outward action, should be treated as waiver (or acquiescence) and not as constituting a representation. Treated

[1] Campbell, C. J. in Baker *v.* Johnston, 21 Mich. 319, 345. See also Lee *v.* Lake, 14 Mich. 12.

[2] Solberg *v.* Decorah, 41 Iowa, 501; Sheen *v.* Stothart, 29 La. An. 630. In Gilbert *v.* Manchester, 55 N. H. 298, a way had been held out by the defendant town for thirty years as public, and it was held that the defendant was estopped to say that it was not a public street.

[3] Cameron *v.* Stephenson, 69 Mo. 373. See also Landon *v.* Litchfield, 11 Conn. 251; Cruger *v.* Dougherty, 43 N. Y. 107, concerning payment of taxes without objection. But see Ives *v.* North Canaan, 33 Conn. 402.

[4] See e. g. Williamson *v.* New Jersey R. Co., 29 N. J. Eq. 311; Hamlin *v.* Sears, 82 N. Y. 327; Lorentz *v.* Lorentz, 14 W. Va. 809. Further, concerning 'acquiescence as working 'estoppel,' see ante, p. 457; Steadman *v.* Taylor, 77 N. Car. 134; Kent *v.* Quicksilver, 78 N. Y. 159; Atlantic R. Co. *v.* Robbins, 35 Ohio St. 531; Quinlan *v.* Myers, 29 Ohio St. 500; Miller *v.* Brown, 33 Ohio St. 547; Young *v.* Babilon, 91 Penn. St. 280; Scott *v.* Strawn, 85 Penn. St. 471; Watt's Appeal, 78 Penn. St. 370; Grand Trunk Ry. Co. *v.* Dyer, 49 Vt. 74; Sims *v.* Chattanooga, 2 Lea, 694; Broyles *v.* Nowlin, 3 Baxter, 191; Hoyt *v.* Sprague, 103 U. S. 613; McClure *v.* Lewis, 72 Mo. 314.

as waiver it is immaterial that the party claiming the estoppel knew the facts; waiver is not only consistent with, it is generally created upon knowledge of, all the facts by both parties. Treated as a representation the case would fall under the other head of estoppels by conduct, and knowledge by the party alleging the estoppel would be fatal. This difference between the two estoppels is founded upon difference in subject-matter, to be seen in the fact that in the present case parties are openly and expressly dealing with known rights; in the other case a secret concealed right is brought forward against one who has been led by the party originally owning it to believe that that one has acquired it. He has not acted in good faith if he knew the facts.[1]

There is a further difference in principle between the two classes of estoppel, growing out of the same difference in subject-matter. We have seen that in the case of concealed rights or titles pure silence may be misleading and so raise an estoppel.[2] That proceeds upon the ground that the right or title is unknown to and withheld from the person acting. In the present case, however, the facts are known to him as well as to the other party; it should accordingly require more to make out the estoppel than in the other case. There should be some clear and decisive act or conduct, beyond silence, to work the waiver, as we have seen in regard to waiver of proofs of loss under policies of insurance. The party claiming the benefit should in this case as much as in the other show that he has been misled into the confidence reposed;[3] and pure silence by the one party in regard to a right perfectly known to the other can rarely mislead a man of average intelligence, by whose probable action the case must of course be judged.[4]

If, then, the act of the party claiming the waiver was purely voluntary, with full knowledge of the other's rights, and no act or conduct of the latter, beyond mere silence, induced the ex-

[1] Quoted in McLain v. Buliner, 49 Ark. 218, 225, 226.

[2] Ante, pp. 584 et seq.

[3] See Lewis v. Champion, 40 N. J. Eq. 59, 62.

[4] The distinction argued (as the author knows) and sustained in Fowler v. Parsons, 143 Mass. 401, 406, 407; McLain v. Buliner, 49 Ark. 218.

penditure or other change of position, there will be no estoppel; to 'stand by and see,' though enough in a case of concealment, is not ordinarily enough here.[1] In Atlanta *v.* Gate City Gas Co. it appeared that a gaslight company had obtained a charter from the legislature to use the streets of Atlanta for its pipes and fixtures, and the city authorities 'stood by and saw' the company make heavy outlays in the execution of their powers, without intimating that objection would be made to the use of the streets for the purpose in question. Without such use not only could not the enterprise be prosecuted, — the outlay would be lost. It was held, however, that the city was not estopped to object to the laying of the pipes.[2] But this comes very near to the 'misleading silence' of the authorities.[3]

How strong and decisive the act supposed to create the waiver must be does not appear, and probably could not be stated in the way of a general rule, further than this, that the act or conduct of the party to be estopped must be such as would be apt to mislead a prudent man in a case where there is much risk. Some of the decisions appear to have gone a questionable length against the waiver. In Kelso's Appeal[4] it appeared that a married woman entitled to dower of lands about to be sold said to one who thereupon bought, 'I make no claim to dower, and don't intend to. You need n't hesitate a moment on that account.' It was held that she was not estopped to set up her dower rights against the purchaser. The ground of decision is not stated; probably it was that the party to be estopped was not sui juris.[5] If it proceeded upon the ground of

[1] Ramsden *v.* Dyson, L. R. 1 H. L. 129; Maxwell *v.* Bay City Bridge Co., 46 Mich. 278; Atlanta *v.* Gate City Gas Co., 71 Ga. 106; Allen *v.* Kellam, 69 Ala. 442; Stockman *v.* Riverside Co., 64 Cal. 57; Gawtry *v.* Leland, 40 N. J. Eq. 323.

[2] But comp. Athens *v.* Georgia Ry. Co., 72 Ga. 800, where, however, the acts themselves were contrary to a municipal ordinance. And see Atlanta *v.* Word, 78 Ga. 276; Augusta *v.* Port Royal Ry., 74 Ga. 658.

[3] Ante, p. 584.

[4] 102 Penn. St. 7.

[5] See ante, p. 599. The court said, 'The case presents some strong equities in favor of the appellant.' On the other hand, it is held that an owner of land entitled to demand prepayment of land to be taken under eminent domain by a railroad company will be estopped to claim the right by allowing the company, with his knowledge, to construct the road on his land and make large outlays of money in improvements. New Orleans R. Co. *v.* Jones, 68 Ala. 48, citing Trenton R. Co. *v.*

a promissory representation,[1] the answer would be that such ground applies only to the case of concealed rights; cases of waiver are commonly in their nature promissory, as the above-mentioned insurance cases, among others, show.[2]

In ordinary cases it appears to be necessary, to make a waiver effective, that the party claiming it (or his predecessor in right) should have been led to act upon the facts going to make up the waiver, to his detriment.[3] But in certain cases this is not required; mere word of mouth there seems to be enough, as e. g. where, after the maturity of a promissory note, an indorser, with knowledge that his liability has never been fixed, promises to pay the note.[4] But such cases are probably to be considered as exceptions; unless the 'waiver' really amounts to an election (of which in the next chapter), the facts should, it seems, be acted upon or there should be a consideration.[5] Such cases at all events should not be called estoppel.

Chambers, 9 N. J. Eq. 471; McAuly v. West Vermont Ry., 33 Vt. 311. But that is only a matter of the time of payment.

[1] Ante, p. 574.

[2] This ground of waiver is perhaps the most satisfactory one upon which to explain cases of the destruction of a deed by the grantor for the purpose of enabling the grantor to convey to another party, consenting to the arrangement. The first grantee is said to be estopped to claim against the second, at least if the first deed was not recorded. Lawrence v. Stratton, 6 Cush. 163; Holbrook v. Tirrell, 9 Pick. 105; Commonwealth v. Dudley, 10 Mass. 403; Howard v. Massengale, 13 Lea, 577; ante, p. 578. The estoppel must of course be in pais, by conduct; it cannot be by misrepresentation; it may be by waiver, for it is an agreement in effect not to assert a right known (in law) to both parties.

There may be still other cases in which an estoppel will arise with full knowledge of all the facts by both parties. Thus, in Mason v. Mason, 101 Ind. 25, it is held that marrying and living with a divorced woman as wife for two years, when at the time of marrying her she was under judicial inhibition to marry, to the husband's knowledge, estops him, on a suit by her for divorce from him, to deny the validity of the marriage. But the soundness of such cases is not clear.

[3] Henry v. Gilliland, 103 Ind. 177, 180.

[4] Sigerson v. Mathews, 20 How. 496.

[5] The facts may be acted upon in many ways. 'A citizen of another state, who proves his debt in the course of proceedings under a state insolvent law, which could not constitutionally bind him without his assent, cannot afterwards impeach the validity of the certificate of discharge granted upon those proceedings, except as allowed by that law.' Gray, J. in Burpee v. Sparhawk, 108 Mass. 111, 114, citing Clay v. Smith, 3 Peters, 411; Gilman v. Lockwood, 4 Wall. 409; Journeay v. Gardner, 11 Cush. 355.

C. *QUASI-ESTOPPEL.*

CHAPTER XXI.

ELECTION AND INCONSISTENT POSITIONS GENERALLY.[1]

§ 1. *Election.*

A PARTY cannot either in the course of litigation or in dealings in pais occupy inconsistent positions.[2] Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.'[3] And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts;[4] the election, if made with knowledge of the facts, is

[1] It may be doubted whether this subject properly belongs to the law of estoppel. Still, it has come to be so generally treated as a phase of estoppel that we have not felt at liberty to omit it. See Strosser *v.* Fort Wayne, 100 Ind. 443, 452. Indeed, it is perhaps well to bring together the scattered fragments of the law having a resemblance to election, and give them a common name. The right in all these cases, including that of election, is specific, and therefore so far like estoppel. Hence, the name 'election' not having met with favor beyond its old limits, we venture to name the whole group of cases 'Quasi-Estoppel.'

[2] Strosser *v.* Fort Wayne, 100 Ind. 443, 452; Daniels *v.* Tearney, 102 U. S. 415; Moshier *v.* Frost, 110 Ill. 206; Lehman *v.* Clark, 85 Ala. 109; Rabitte *v.* Orr, 83 Ala. 185; Espy *v.* Comer, 80 Ala. 333; Jones *v.* Clouser, 114 Ind. 387.

[3] In re Chesham, 31 Ch. D. 466, 473, Chitty, J.

[4] Steinbach *v.* Relief Ins. Co., 77 N. Y. 498; Fields *v.* Bland, 81 N. Y. 239; Scholey *v.* Rew, 23 Wall. 331; Rodermund *v.* Clark, 46 N. Y. 354; Morris *v.* Rexford, 18 N. Y. 552. See Meyer *v.* Clark, 45 N. Y. 286; Succession of Monette, 26 La. An. 26; Weedon *v.* Landreaux, ib. 729; Connihan *v.* Thompson, 111 Mass. 270; Watson *v.* Watson, 128 Mass. 152; Lilley *v.* Adams, 108 Mass. 50; Sloan *v.* Holcomb, 29 Mich. 153; Kunzie *v.* Wixom, 39 Mich. 384; Walsh *v.* Varney, 38 Mich. 73; Thompson *v.* Howard, 31 Mich. 309; Stoddard *v.* Cutcompt, 41 Iowa, 329; Lee *v.* Templeton, 73 Ind. 315.

in itself binding, — it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position. 'Electio semel facta, et placitum testatum, non patitur regressum.' 'Quod semel placuit in electionibus amplius displicere non potest.'[1]

The phases in which this doctrine is presented are extremely various; in the present connection we treat of those only which arise out of court, reserving for chapter twenty-four the consideration of the subject in its relation to the conduct of causes. The subject may be considered first, with reference to the facts requiring or permitting an election; and secondly, with reference to the facts constituting an election.

With regard to the facts which require an election the most familiar statement of the doctrine is found in the law of wills.[2] It is laid down (rather too broadly, it seems) as an old rule of equity that a person who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the same, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will.[3] Thus, if a man devise to A property

[1] Coke, Litt. 146. See e. g. Kinney v. Kiernan, 49 N. Y. 164; Syme v. Badger, 92 N. Car. 706; Mendenhall v. Mendenhall, 8 Jones, 287; Jones v. Gerock, 6 Jones, Eq. 190; Yorkly v. Stinson, 97 N. Car. 236, 240; 1 Bigelow, Law of Fraud, 486.

[2] The doctrine applies to deeds as well. 2 Story, Equity, § 1077, note; § 1080.

[3] Whistler v. Webster, 2 Ves. Jr. 367; Board v. Board, L. R. 9 Q. B. 48; Jacobs v. Miller, 50 Mich. 119, 126; Hyde v. Baldwin, 17 Pick. 303; Cox v. Rogers, 77 Penn. St. 160; Wise v. Rhodes, 84 Penn. St. 402; Thellusson v. Woodford, 13 Ves. 209; Churchman v. Ireland, 1 Russ. & M. 250; Tibbetts v. Tibbetts, 19 Ves. 655; Brown v. Ricketts, 3 Johns. Ch. 553; Etcheborne v. Auzerais, 45 Cal. 121; Noe v. Splivalo, 54 Cal. 207; Morrison v. Bowman, 29 Cal. 337; Collins v. Woods, 63 Ill. 285; Gorham v. Dodge, 122 Ill. 528.

There is reason to doubt, however, as the text intimates, whether the rule should be stated so broadly. In Wollaston v. King, L. R. 8 Eq. 165, 174, Vice-Chancellor James, a great equity judge, says that the later cases do not justify the rule to the extent in which it was formerly laid down. He says that the rule to be deduced from the (English) cases is that election is to be applied between a gift under a will and a claim dehors the will and adverse to it; it was not to be applied between one clause in a will and another clause in the same will. 'It would seem,' says he, 'a very strange thing that in construing the same instrument the court, dealing with a clause in which a fund is expressed to be given partly to A and partly to B, should hold that, the gift

which belongs to B, and, by the same will, give to B his own (the testator's) estate, B must convey his property to A, or he cannot take the property devised to him under the will, except upon the footing of making compensation to A, out of the property which B takes by the will, but not beyond, what A would have received under the will.[1] The only question in such a case is, Did the testator *intend* (judging from the face of the will) that the property should go in such a manner? It is immaterial whether the testator thought he had the right, or knowing the extent of his rights intended by an arbitrary exercise of power to exceed them; in either case the party accepting the gifts of the will can only take the property on the terms, or the equity of the terms, upon which it was given.[2]

Married women[3] and infants[4] may bind themselves by election; though neither perhaps could do so before the right accrued upon which the election was to be made. At least it is held that a married woman cannot bind herself by electing between a jointure and dower; only a widow can do that.[5] A more diffi-

to A being void, the testator's intention is that B should take the whole; and then coming to another clause in which another fund is given to B, and no mention of A at all, it should hold that there is an implied condition that B should give back part of that which it was the testator's intention that he should take.'

The rule against claiming under and against a will at the same time will not prevent one to claim under the will so far as to recognize that the executors thereunder have the lawful administration of the estate, and to deny that the provisions of the will in disposing of the property are valid. De Mora *v.* Concha, 29 Ch. D. 268, 305, affirmed in House of Lords nom. Concha *v.* Concha, 11 App. Cas. 541.

[1] 1 Jarman, Wills, 443, 4th ed. The rule of equity in regard to such cases is that of compensation to the disappointed donee, not of forfeiture by the donee who keeps his own. In re Chesham, 31 Ch. D. 466, 475, 2 Story's Equity, § 1085. It is held in the case just cited, against a dictum in Wilson *v.* Townsend, 2 Ves. 693, 696, that the rule of compensation applies only to elections *against* the will, not to elections to take under it.

[2] Ker *v.* Wauchope, 1 Bligh, 1, 25; Upshaw *v.* Upshaw, 2 Hen. & M. 381; Whistler *v.* Webster, 2 Ves. Jr. 367, 370; Wilson *v.* Townsend, ib. 696; Blake *v.* Bunbury, 4 Brown, Ch. 25. The estoppel extends to privies. Rowley *v.* Towsley, 53 Mich. 329, 340; Merrick's Estate, 5 Watts & S. 9.

[3] Barrow *v.* Barrow, 4 Kay & J. 409, 419; Griggs *v.* Gibson, L. R. 1 Eq. 685; Codington *v.* Lindsay, L. R. 8 Ch. 578; Willoughby *v.* Middleton, 2 Johns. & H. 344; In re Chesham, 31 Ch. D. 466, 472; Tiernan *v.* Roland, 15 Penn. St. 429.

[4] Storring *v.* Borren, 55 Barb. 595; In re Chesham, 31 Ch. D. 466, 472, 473.

[5] Frank *v.* Frank, 3 Mylne & C. 171, 178, 179.

cult question has arisen where, in the case of an election by a married woman, the only property with which the person disappointed by her election can be compensated is subject to a restraint upon anticipation by her. Formerly the authorities were in conflict; Lord Hatherly holding in one of the cases already cited [1] that there could be an election in such a case, and Sir George Jessel holding the contrary,[2] on the ground that to permit election would be to defeat the restraint upon anticipation. This view has now prevailed.[3] In the case first cited a marriage settlement settled a fund for the wife with restraint upon anticipation and a covenant by her, then an infant, to settle property acquired afterwards. The covenant was of course void, unless the doctrine of election could be invoked. It was held that the wife was not bound to elect between taking after-acquired property and her interest under the settlement, but could hold both.

This doctrine of election is never applied in the law of wills when, if an election is made contrary to the will, the interest which would pass from the testator by the will cannot be laid hold of in equity to compensate the disappointed donee. Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away.[4] And the doctrine further becomes difficult to apply when the testator has a partial interest in the property to be dealt with by the first donee.[5] In such cases the court will incline to a construction which would make him deal only with his own, and thus prevent the necessity of an election. But where a testator entitled to only part of an estate uses words in devising it which clearly show that he intended to pass the entirety, the owner of the other part, if he receives a bounty under the will, is put to his election.[6] And it matters not in any case

[1] Willoughby *v.* Middleton, 2 Johns. & H. 344.

[2] Smith *v.* Lucas, 18 Ch. D. 531.

[3] In re Vardon, 31 Ch. D. 275 (reversing 28 Ch. D. 124); In re Wheatley, 27 Ch. D. 606; In re Glanvill, 31 Ch. D. 532, C. A.

[4] Bristow *v.* Warde, 2 Ves. Jr. 336; Box *v.* Barrett, L. R. 3 Eq. 244. See In re Chesham, 31 Ch. D. 466, holding that if the donee has no interest in that out of which the compensation must be made if at all, as where the gift is of heirlooms of which he is in lawful enjoyment, there is no case for an election.

[5] Ranclyffe *v.* Parkyns, 6 Dow, 149, 185.

[6] Padbury *v.* Clark, 2 Macn. & G. 298; Wilkinson *v.* Dent, L. R. 6 Ch. 39.

that the testator *supposed* that he owned or had the power to dispose of the property in question if the fact were otherwise.[1]

The intention to dispose of particular property by will must appear from the will itself.[2] And accordingly a mere general devise cannot be shown aliunde to have been intended to cover property which did not belong to the testator, where the object of the evidence is to put the donee to an election.[3] So election may be excluded by an expression of intention by the testator that only one of several gifts to a donee shall be conditional on his giving up what the testator attempts to devise away from him. If, for instance, a testator has two sons, the elder being owner of a particular piece of land, and it should appear convenient to the testator that this piece should go to the younger son along with other property which he is devising to him, and he devises accordingly, then if among other gifts to the elder son he should give him a piece of property which the will states to be in lieu of the particular piece to be given by the elder to the younger son, the elder would be put to an election merely between these two pieces of property, and could hold the other gifts absolutely.[4]

In cases, however, where the intention to require an election is clear, there (notwithstanding the common-law doctrine that when a devise confers no more than the law of descent would cast upon an heir he takes by descent) a devise giving what would fall to the devisee upon intestacy may put the heir to his election. In contemplation of equity the testator means, as in other cases, that if the condition of giving up the heir's estate be not complied with, the disappointed donee shall have out of the estate over which the testator had power, a benefit corresponding to that of which he is deprived by the action of the heir.[5]

The necessity of election arises similarly where a testator or other donor gives his own exclusive property to another with certain burdens attaching to it, upon condition that the donee

[1] Stump v. Findlay, 2 Rawle, 168, 174; 1 Jarman, Wills, 445, Bigelow's ed.

[2] Clementson v. Gandy, 1 Keen, 309.

[3] Cavan v. Darlington, 2 Ves. Jr. 544; s. c. 3 Ves. Jr. 384, 521; Pole v. Somers, 6 Ves. Jr. 309, 334.

[4] Wilkinson v. Dent, L. R. 6 Ch. 339, 341.

[5] Welby v. Welby, 2 Ves. & B. 187, 190.

shall take subject to the burdens. In such a case the donee must elect whether he will take the property at all or not. If he take it, he must take it cum onere.[1] If, however, no such condition be annexed or implied, the donee may elect that part of the bounty which will be of benefit to him, and reject the burdensome part, supposing the two are separable.[2]

Again, where a man having power to appoint a fund to A, which in default of appointment is given to B, exercises the power in favor of C, and gives other benefits to B, in such a case though the appointment to C may be void, yet if B accept the benefits given him, he must convey the estate to C according to the appointment.[3] So where a person having power to appoint to two, appoints to one only, and gives a legacy not under the power to the other, a case for election arises.[4] And the same is true where a person having a power of appointment attempts to delegate the same to another, and by the same instrument makes a gift to the object of the power; such person is put to an election. He cannot retain the benefit and also claim the property against the execution of the power thus improperly delegated.[5]

With regard to what requires an election in the case of dower, the intention to put the widow to an election must at common law be clearly expressed, or the gift to her must be so inconsistent with the right of dower as to render the intention of the testator unequivocal.[6] But this rule has been changed by statute in many states, and the widow required to elect unless the will shows that the testator intended that she should have both estates, — dower and the estate given by the will. Indeed, the widow may in some states elect to take under the will, and yet contest other parts of it.[7]

[1] Talbot *v.* Radnor, 3 Mylne & K. 252; Scholey *v.* Rew, 23 Wall. 331.

[2] Moffett *v.* Bates, 3 Smale & G. 468.

[3] Sugden, Powers, 578, 8th Eng. ed.

[4] Ibid. 589.

[5] Ingham *v.* Ingham, 2 Atk. 88.

[6] Bull *v.* Church, 5 Hill, 206; s. c. 2 Denio, 430; Savage *v.* Burnham, 17 N. Y. 561, 571; Lord *v.* Lord, 23 Conn. 327; Fulton *v.* Fulton, 30 Miss. 586; Braxton *v.* Freeman, 6 Rich. 35; Higginbotham *v.* Cornwell, 8 Gratt. 83; Shaw *v.* Shaw, 2 Dana, 342.

[7] In a late case in Ohio (Carder *v.* Fayette Co., 16 Ohio St. 353) arising under statutory law the Supreme Court says: 'We hold that the election of the widow to take under the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claims as heir. She can do all or either of these without having her election set aside. Her right to elect is

In regard to the question what constitutes an election, it is held in general that any decisive act done by a person with knowledge of his rights and of all other facts material to him is binding.[1] Thus, one who takes possession of property under a will, and holds and manages it for a long time, and especially if he sell the whole or part of it, will be considered to have made a binding election to accept that property upon the terms of the will.[2] It becomes a difficult matter, however, in some cases to determine what action of this sort amounts to an election. In Fitts *v.* Cook[3] it was held that no election had been made. A

the creature of statutory law, and we must look to the statutes creating it alone for the estoppel it is to work. These statutes make her election to take under the will a bar to dower, and to her distributive part of the personal estate due to her as widow, and to nothing else. A contrary reading of the statutes would in many instances result in the greatest injustice to her. She is compelled to make an election, and is only allowed one year for that purpose. The heirs may contest the will or not at their discretion, and they are allowed two years in which to commence the contest. The widow must complete her election within one year, and the heir must begin his contest in two years. How can the widow know at the time of making her election whether there will be a contest? And if she could know that, must she at her own peril predetermine the rights of the parties thereto? There would be no safety to her in such a construction of the law. She might validate the will by an election, and the heirs invalidate it by a contest. It would then seem to be a will as to her, and no will as to them. On the other hand, should she decide that the will was invalid and would be set aside, and therefore decline to take under it, the will might ultimately be established and she be made to lose all benefit, however great, of its provisions in her favor. Thus, an election which was intended for the benefit of the widow would become a means to entrap her, and would render her right uncertain and impracticable. Such is not the law. If there is no valid will, there is no valid election and of course no estoppel or bar. And it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the document probated becomes or remains established as a valid "will" that her election can have any effect whatever; and when such is the case, the effect of the election is confined to her rights as widow, and cannot reach her rights as heir to property not effectually and legally disposed of by the will. The will and its devises and bequests to other persons stand unaffected by her election either to take or to refuse its provisions in her favor. The whole effect in the one case is to destroy her rights as widow, and in the other to destroy her rights as devisee or legatee, and in their place to give her the rights of the widow of an intestate.'

[1] Connihan *v.* Thompson, 111 Mass. 270; Rodermund *v.* Clark, 46 N. Y. 354; Sanger *v.* Wood, 3 Johns. Ch. 416; Littlefield *v.* Brown, 1 Wend. 398; s. c. in error, 11 Wend. 467; Barwick *v.* Rackley, 46 Ala. 402.

[2] Upshaw *v.* Upshaw, 2 Hen. & M 381.

[3] 5 Cush. 596.

testator had devised to his son Obed lands of which he was only tenant by the curtesy; and he devised to his wife the use during life of a third part of all his real estate and the right of occupying such part of his dwelling-house as might best promote her convenience and comfort, and also various articles of personal property. The residue of his property he gave to his children (including Obed), who were also the heirs at law of his wife. The will was proved without objection; and the widow and children continued to live together on the estate without making any division or setting off dower. The widow having died, the children continued long afterwards upon the premises without change. Her heirs now claimed the land devised to Obed; and he contended that they were estopped to repudiate the will. The court held, however, that no election had been made to take under the will.[1]

On the other hand, it has been held in Ohio that where, in

[1] Mr. Justice Dewey, in delivering the opinion of the court, said: 'It is not inconsistent with Joanna Cook's [the widow's] legal rights, and a present purpose on her part at a future day to assert her right to the land of which she was seised in her own right and independent of her husband. Take the facts as stated. All the other lands were occupied by Obed as well as those which are the subject of controversy. But the will gave Joanna Cook one third part of the real estate. She did not set off this one third. Things being left in this loose state, and none of the parties exercising rights adversely to each other, it will not do to draw inferences from these acts that shall operate as an estoppel against parties subsequently setting up legal rights to the lands thus occupied. To authorize such an estoppel the conduct of the party should be manifestly inconsistent with the rights now claimed. Estoppel in pais only arises when manifest justice and equity as respects the interest of another require its application. In looking at the provisions of this will it will be seen that they are so little a departure from what would have been the legal rights of Joanna Cook without the will that little can be inferred from her subsequent use of the property in the manner set forth in the agreed statement. . . . The further fact relied upon in the statement, that Obed Cook purchased of Fitts and wife [the plaintiffs] about a year since, their interest in the furniture which was devised by Gad Cook, does not prove any acceptance of the will or assent to the same. Whether it was the property of Joanna Cook or property of the estate of Gad Cook, upon the death of Joanna Cook, it might naturally be divided among the children who survived her and be made the subject of a sale of an undivided interest therein. Indeed, the whole circumstances stated as to the use of the property after the death of Gad Cook are consistent with a family arrangement among themselves to live together during the life of Joanna Cook, and all to participate in the property, without any special reference to the will or to the devise therein of property belonging to Joanna Cook.'

case of a devise of real estate to a widow for life, with remainder in fee to one of the testator's sons, the widow, without following the form prescribed for making her election to take under the will, set up no claim for dower, but in fact acted under the will and had the use and occupancy of the premises for a series of years, she was estopped to deny that she had elected to take under the will.[1]

In Dewey *v.* Bell[2] the plaintiff as indorsee sued the defendant as maker of a promissory note. It appeared that the defendant had executed the note in question for the purpose of renewing a former note, and that his agent carried the note to one Way (who as indorser of the prior note, had taken it up), desiring him to take this latter note in exchange for and payment of the earlier one. Way said he would take it as collateral to the first note, and the agent assented and left the note with him. Way now indorsed the last note and procured it to be discounted, and it finally came into the hands of the plaintiff. The court held that when Way procured the note to be discounted, he estopped himself from saying that he had not taken it for the purpose for which it had been made. It operated as a payment of the prior note; and the plaintiff was therefore entitled to recover.[3]

[1] Thompson *v.* Hoop, 6 Ohio St. 480, overruling Stilley *v.* Folger, 14 Ohio, 610. See Stockton *v.* Wooley, 20 Ohio St. 184, 189; Winship *v.* Winship, 43 Ind. 291.

[2] 5 Allen, 165.

[3] A very similar case was subsequently tried before the same court, and with a like result. Hooker *v.* Hubbard, 97 Mass. 175. 'We cannot distinguish this case,' said Foster, J. in delivering the judgment, 'from Dewey *v.* Bell [supra]. The note of November 14 was given for no other purpose than to renew and pay the one of earlier date now in suit. The plaintiff knowing this fact had no right as against this defendant to take it except in payment. Having elected to take it and enforce it by suit, the law conclusively presumes that he took it for a rightful and not an illegal and fraudulent purpose, and the plaintiff is estopped to allege the contrary. It is plain that both notes cannot be enforced rightfully against the present defendant. The plaintiff must fail in one of the two pending actions. If the acceptance of the second note be not treated as payment of the first, by a negotiation of the second to a bona fide holder for value before maturity the defendant might have been rendered liable on both. To avoid this unjust result and prevent the plaintiff from accomplishing a successful fraud to the injury of an innocent person, the just and equitable principle of estoppel is invoked, and the plaintiff is held to be forever bound by that construction of the transaction according to which alone it was rightful. Dewey *v.* Bell is precisely like this case, with this exception: there the negotiation of the note given in payment had actually taken place. The commencement of a suit on the renewal note is an equally decisive act

In this connection a recent case in New York may be noticed.[1] In that case it was held that where a husband loans money and takes a note therefor payable to the order of himself and wife, and afterwards makes a will containing a devise or bequest to the wife by its terms to be accepted and received in lieu of dower and of all claims upon the estate; if the note remains unpaid at the time of his death, and she survives, she acquires title to the note as a gift and not as a part of his estate at the time of his death, and she is not put to her election between the note and the provision for her in the will, but is entitled to both. And it was further held that the fact that she had given the note to the appraisers as part of her husband's estate was not conclusive (though it was evidence tending to show that she had released to him her right of survivorship) and did not estop her from claiming the note, in the absence of evidence that the position of any party had been changed in consequence, or that any transaction was had in reliance thereon.

In the case of Smith *v.* Smith[2] an action was brought for breaking and entering a close. The defendant claimed title under a deed from the father of the parties, who by his will had devised the locus to the plaintiff, and to the defendant the residue of the land described in the deed, and other lands. The defendant admitted at the trial that with a full opportunity to judge and full knowledge of the nature of the estate given by the will and of its situation, he had accepted and was determined to hold the estate devised by the will to him; but he intended to hold also under the deed if the law would allow him to claim under both. It was contended for the defendant that having acquired a legal title to the locus before the will was made, he could not be divested of it or estopped to use and enjoy it by accepting under the will, at any rate not at law; but the court decided otherwise, and referring to the principle of equity above stated, said that it was equally applicable at law.[3]

of election to make it the plaintiff's own, and in this case as much as that the plaintiff is estopped to say he did not accept it for the purpose for which it was made.' See Hill *v.* Huckabee, 70 Ala. 183, 188.

[1] Sanford *v.* Sanford, 58 N. Y. 69; s. c. 45 N. Y. 723.

[2] 14 Gray, 532.

[3] But the grantee of land conveyed by an intestate with intent to defraud his creditors is not estopped by taking

It will be found upon an examination of these and other cases that wherever the rights of other parties have intervened, or the rights of the party alleging the estoppel have been otherwise affected, by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches,[1] was based on a knowledge of the facts and of his rights,[2] he will be deemed to have made an effectual election; and he will not be permitted to disturb the state of things, whatever may have been his rights at first.[3] But the mere institution of a suit by a legatee to contest a will, if the suit is withdrawn, is not an election;[4] nor is mere acquiescence or waiver without consideration, not amounting to an election, binding if a change of purpose will not affect the rights of others.[5] And of course the consent or acquiescence must have been made understandingly, sometimes even of the party's rights under the law.[6]

§ 2. *Inconsistent Positions generally.*

Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming

under the deed and acting upon it to object as one of the creditors of the estate that the deed was fraudulent. Norton *v.* Norton, 5 Cush. 524.

[1] Williams *v.* Allison, 33 Iowa, 278.

[2] Logansport *v.* Uhl, 99 Ind. 531, 540; Watson *v.* Watson, 128 Mass. 152; Macknet *v.* Macknet, 29 N. J. Eq. 54; Stedman *v.* Davis, 93 N. Y. 32; Jenkins *v.* Means, 59 Ga. 55; Georgia R. Co. *v.* Hamilton, ib. 171; Brown *v.* Driggers, 62 Ga. 354; Long *v.* Bullard, 59 Ga. 355.

[3] Quoted with approval in Strosser *v.* Fort Wayne, 100 Ind. 443, 446, and in Yates *v.* Hurd, 8 Col. 343, 348.

[4] Clough *v.* London Ry. Co., L. R. 2 Ex. 26, Ex. Ch., modifying Newnham *v.* Stevenson, 10 C. B. 713, 723; State *v.* Adams, 71 Mo. 620. See also Whitwell *v.* Vincent, 4 Pick. 449; Bulkley *v.* Morgan, 46 Conn. 393; Equitable Foundry Co. *v.* Hersee, 103 N. Y. 25. To bring suit would, however, be prima facie evidence of an election. See 1 Bigelow, Law of Fraud, 437.

[5] See Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 164; Cruger *v.* Dougherty, 43 N. Y. 107; Landon *v.* Litchfield, 11 Conn. 251; Ives *v.* North Canaan, 33 Conn. 402; Smith *v.* Smith, 30 Conn. 111; Flege *v.* Garvey, 47 Cal. 371; Jones *v.* Clark, 42 Cal. 181; Meley *v.* Collins, 41 Cal. 668; Watt *v.* McGalliard, 67 Ill. 513; Maquoketa *v.* Willey, 35 Iowa, 323; Adams *v.* B. & M. R. Co., 39 Iowa, 507; Prout *v.* Wiley, 28 Mich. 164; Mason *v.* Finch, ib. 282; Lackland *v.* Stevenson, 54 Mo. 108; Sherman *v.* Parish, 53 N. Y. 48; Miller *v.* Miller, 5 Heisk. 723.

[6] Ellsworth *v.* Ellsworth, 33 Iowa, 164; Evans's Appeal, 51 Conn. 435; Macknet *v.* Macknet, 29 N. J. Eq. 54; Watson *v.* Watson, 128 Mass. 152; Charlestown *v.* County Commissioners, 109 Mass. 270. See 1 Story's Equity, pp. 116, 117, note, 13th ed.

under it, to attack any of its provisions.[1] The same is to be said, on still stronger grounds, of the trustee; and in general, persons accepting and holding lawful[2] posts of duty are similarly estopped while holding the post, or while retaining the emoluments or benefits of it.[3] So also one who accepts the term of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest.[4] Thus, a party actively affirming a transaction such as a contract or a purchase, by receiving and retaining money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions.[5] In the case of the Water Witch the consignees of a cargo of freight libelled the ship in which it had been carried for damage to the goods; and the owner of the ship at the same time libelled the cargo for freight and primage. The causes were heard together; and the court held that by receiving the

[1] Pickett *v.* Merchants' Bank, 32 Ark. 346; Frierson *v.* Branch, 30 Ark. 453.

[2] See School District *v.* Atherton, 12 Met. 105; Mitchell *v.* Horton, 75 Iowa, 271, 277.

[3] Damouth *v.* Klock, 29 Mich. 289; Woburn *v.* Henshaw, 101 Mass. 103; McClure *v.* Commonwealth, 80 Penn. St. 167; Harbin *v.* Bell, 54 Ala. 389. See Mitchell *v.* Horton, 75 Iowa, 271; Krekel *v.* Kreichbaum, 71 Iowa, 702, 706; Kothman *v.* Markson, 34 Kans. 542; Loveman *v.* Taylor, 85 Tenn. 2; Reichert *v.* Voss, 78 Ga. 54; Atkinson *v.* McDonald, 74 Ga. 350; Union Ins. Co. *v.* Slee, 123 Ill. 57; ante, p. 552.

[4] Jacobs *v.* Miller, 50 Mich. 119, 126; Du Bose *v.* Ball, 64 Ga. 350; Robinson *v.* Pebworth, 71 Ala. 240, 247 ('you shall not be heard to claim both under and against the same title'); Butler *v.* O'Brien, 5 Ala. 316; Morris *v.* Hall, 41 Ala. 510; McReynolds *v.* Jones, 30 Ala. 101; Swanson *v.* Tarkington, 7 Heisk. 612; Williams *v.* Gideon, ib. 617; Emmons *v.* Milwaukee, 32 Wis. 434; State *v.* Langer, 29 Wis. 68. See Roby *v.* Chicago, 64 Ill. 447.

[5] Water Witch, 1 Black, 494; Flanigan *v.* Turner, ib. 491; New York *v.* Sonneborn, 113 N. Y. 423; Albany *v.* Watervliet Turnp. Co., 108 N. Y. 14; Seneca *v.* Allen, 99 N. Y. 532, 539; Michigan Ry. Co. *v.* Mellen, 44 Mich. 321; Sutton's Appeal, 112 Penn. St. 598; Klinesmith *v.* Socwell, 100 Ind. 589, 592; Hill *v.* Nisbet, ib. 341; City Bank *v.* Bartlett, 71 Ga. 798; Pike *v.* Stallings, ib. 860; Breeding *v.* Stamper, 18 B. Mon. 175; Coleman *v.* Pike, 83 Ala. 326; Morris *v.* Hall, 41 Ala. 510; Smith *v.* Sheeley, 12 Wall. 358; Phillips *v.* Rogers, 12 Met. 405; Sherman *v.* McKeon, 38 N. Y. 266; Wood *v.* Seely, 32 N. Y. 105; Requa *v.* Holmes, 26 N. Y. 338; Horton *v.* Davis, ib. 495; Light *v.* St. Louis Ry. Co., 89 Mo. 108; Bush *v.* Bush, ib. 360; Patterson *v.* Read, 43 N. J. Eq. 18; Warrenton *v.* Arrington, 101 N. C. 109; Ish *v.* Crane, 8 Ohio St. 520; McArthur *v.* Home Life Assoc., 73 Iowa, 336; Chicago R. Co. *v.* Knuffke, 36 Kans. 367; Hawthorne *v.* East Portland, 13 Oreg. 271. See also Terrell *v.* Grimmell, 20 Iowa, 393; Hewett *v.* Currier, 63 Wis. 386. But it may appear that the money was not accepted in the character supposed. Board of Education *v.* Bakewell, 122 Ill. 339.

cargo, carrying it to the consignees, and then libelling it, the owner was estopped to deny the ship's liability to deliver the cargo in the same order in which it was received, with the usual exceptions. A decree was therefore given in favor of the consignees for so much as the damage to the cargo exceeded the amount of the freight.

Though a contract be in fact wholly *invalid* when executed, still (supposing it not to be prohibited by law as relating to some illegal transaction), if it be acted upon afterwards by the parties to it as valid, they will, if sui juris, be estopped thereafter to allege its invalidity.[1] Thus, if a tax-collector act under his official bond, he, and his sureties also, if they do not object at the proper time, will be precluded from denying the validity of the bond.[2] So too if a party sui juris not only take but *retain* the benefits arising from an invalid sale or contract, he will be precluded in a contest with the other party upon the contract from repudiating it.[3] So to accept money as redemption of property estops the party to deny the payor's right to redeem.[4] And to receive bonds in payment for land taken for a highway estops the receiver to say, contrary to the understanding of the parties, that the location was not permanent.[5] In like manner, persons who have received preferred stock in a corporation, and have for several years accepted interest thereon,

[1] Quoted, Henderson *v.* Price, 96 N. Car. 423, 426; Robinson *v.* Pebworth, 71 Ala. 240, 247. See ante, pp. 459, 465, 552; post, p. 686.

[2] McLean *v.* State, 8 Heisk. 23; Coleman *v.* Pike, 88 Ala. 326; Coons *v.* People, 76 Ill. 383.

[3] Walker *v.* Mulvean, 76 Ill. 18; Padfield *v.* Pierce, 72 Ill. 500; Deford *v.* Mercer, 24 Iowa, 118; Pursly *v.* Hays, 17 Iowa, 310; Rennick *v.* Bank of Chillicothe, 8 Ohio, 529; Vicksburg R. Co. *v.* Ragsdale, 54 Miss. 200; Lee *v.* Gardiner, 26 Miss. 521; Byrne *v.* Hibernia Bank, 31 La. An. 81; Factors' Ins. Co. *v.* De Blanc, ib. 100; Southard *v.* Perry, 21 Iowa, 488; Hoffmire *v.* Holcomb, 17 Kans. 378; Bryan *v.* Des Moines, 51 Iowa, 590; Union Ins. Co. *v.* McGookey, 33 Ohio St. 555; Henry Co. *v.* Winnebago Drain Co., 52 Ill. 454; Planters' Bank *v.* Merritt, 7 Heisk. 177; Fitch *v.* Baldwin, 17 Johns. 161; Rapelee *v.* Stewart, 27 N. Y. 310; Rodermund *v.* Clark, 46 N. Y. 354; Hone *v.* Henriques, 13 Wend. 240; Palmer *v.* Smith, 10 N. Y. 303; Duff *v.* Wynkoop, 74 Penn. St. 300. See Haydock *v.* Coope, 53 N. Y. 68; Tuite *v.* Stevens, 98 Mass. 305; Murray *v.* Jones, 50 Ga. 109. The case of a corporation acting beyond its powers stands on a special footing; receiving and retaining benefits would not prevent it from *terminating* the contract. Oregon Ry. Co. *v.* Oregonian Ry. Co., 130 U. S. 1.

[4] Goddard *v.* Renner, 57 Ind. 532.

[5] Alley *v.* Adams Co., 76 Ill. 101.

cannot object to the power of the corporation to issue the same, when the holders of the common stock, and parties who have guaranteed the interest, make no objection.[1]

However, the estoppel arising from accepting the benefits of a contract applies only when the party may accept or reject without serious inconvenience. A railroad company could not forego the use of its entire track because it has a dispute with some contractor about extra compensation under his contract for the building, e. g. of one of its bridges; the bridge must be used, and the company will not be estopped by using it to object to defaults in the performance of the contract, though known to it all the time.[2] Nor will the receiving an indirect benefit from a transaction, it seems, if without the party's own procurement, have the effect to preclude him from denying the validity of the transaction.[3] And in general, when the position in question has been practically forced upon a party by his opponent's conduct, he will not be bound to stand by it.[4] Nor, perhaps, when one with full knowledge of the invalidity of his act executes a contract with another, will the fact that the latter receives benefits from it estop him from denying its validity.[5]

An estoppel arises also, in the absence of mistake, against a person who collects or receives money for another to deny his own authority to take the money or the right of the other to receive it, so long, at all events, as no superior title is set up in anybody else;[6] unless he claimed the money or part of it when he received it as belonging to him, e. g. as dues.[7] Thus, it has been held that one cannot set up the invalidity of a statute in

[1] Branch *v.* Jesup, 106 U. S. 468, 481. In regard to accepting and retaining the subject of a sale, see ante, p. 467, 552, 553, 685.

[2] Cincinnati *v.* Cameron, 33 Ohio St. 336, 374. See Zottman *v.* San Francisco, 20 Cal. 97; Smith *v.* Brady, 17 N. Y. 173; Ellis *v.* Hamlin, 3 Taunt. 52; Bartholomew *v.* Jackson, 20 Johns. 28.

[3] Ayres *v.* Probasco, 14 Kans. 175.

[4] Potter *v.* Brown, 50 Mich. 436.

[5] Black *v.* Dressell, 20 Kans. 153.

[6] Cairns *v.* O'Bleness, 40 Wis. 469; McKee *v.* Monterey Co., 51 Cal. 275; Iberia *v.* Serrett, 31 La. An. 719; Keyser *v.* Simmons, 16 Fla. 268; Morris *v.* State, 47 Texas, 583; Grattan *v.* Metropolitan Ins. Co., 80 N. Y. 281; Perryman *v.* Greenville, 51 Ala. 507; Hungerford *v.* Moore, 65 Ala. 232. See Hull *v.* Pleasant Valley, 41 Iowa, 494; Reed *v.* Peterson, 91 Ill. 288.

[7] United States *v.* Lawson, 101 U. S. 164; United States *v.* Ellsworth, ib. 170. Even paying the money into the public treasury will not bar the claim upon it if that were done at the command of a superior officer. Ibid.

bar of an action for money which he has collected for the plaintiff under such statute.[1] So one assuming to act in a contract as principal will afterwards be estopped to say that he was in fact acting only as agent.[2] A stockholder in a corporation who has participated in the transactions of the company and received dividends or benefits will also be estopped when sued under the charter to set up the invalidity of the same.[3] And conversely, after attacking a transaction and failing, the party so doing *may* not be allowed to turn round and claim rights under it.[4]

In like manner, if one without actually inducing another to act in a particular way, assent to the thing done and seek to derive a benefit from it, he cannot in case of disappointment deny the validity of the act assented to.[5] Thus, if a man offer himself or consent to appear as a candidate for office at an election held with his assent at an unauthorized voting-place, he will be estopped, if defeated, to say that the election was invalid because the voting was at the wrong place.[6]

Thus far of the effect of retaining or seeking benefits. That is only a special phase of the rule concerning inconsistent positions. Some other phases of the subject may also be noticed. It is held that a landlord who has wrongfully severed fixtures from the realty is estopped to take advantage of his act and treat the fixtures as goods for the purposes of a distress. So it was laid down in Dalton *v.* Whittem.[7] This was an action of trover for 'certain goods and chattels, to wit, two metal counters,' etc. On the trial it appeared that the articles referred to were fixtures attached to a house of which the plaintiff was tenant under the

[1] Perryman *v.* Greenville, 51 Ala. 507; Morris *v.* State, 47 Texas, 583.

[2] Reigard *v.* McNeil, 38 Ill. 400.

[3] Wheelock *v.* Kost, 77 Ill. 296; McCarthy *v.* Lavasche, 89 Ill. 270, citing Baker *v.* Brannan, 6 Hill, 47; Embury *v.* Conner, 3 Comst. 511; Easton *v.* Aspinwall, 19 N. Y. 119; Mead *v.* Keeler, 24 Barb. 25; Ferguson *v.* Landram, 5 Bush, 230. See also People *v.* Sterling Manuf. Co., 82 Ill. 457; Rice *v.* Rock Island R. Co., 21 Ill. 93; Goodrich *v.* Reynolds, 31 Ill. 490.

[4] Ewing *v.* Cook, 86 Tenn. 332, 342. The court did not lay down any positive rule that attacking a transaction would debar one, in case of failure, from claiming rights under it. That would probably be too strong a statement.

[5] Quoted with approval in Field *v.* Doyou, 64 Wis. 560, 564.

[6] People *v.* Waite, 70 Ill. 25.

[7] 3 Q. B. 961. See Zwietusch *v.* Walkins, 61 Wis. 615.

defendant, and that they had been severed in a distress for rent, and disposed of. For the plaintiff it was contended that the fixtures could not be taken under a distress for rent. Counsel for the defendant admitting this contended that for such taking trespass was the proper remedy, and that the plaintiff could not bring trover without waiving the tortious severance and treating the articles as chattels. But the court held the action proper.[1] On the other hand, one who buys property as personalty cannot repudiate the sale (in the absence of fraud or mistake) by asserting that the property is realty.[2]

In like manner, where a municipality levies an assessment to pay the compensation fixed and approved by it for laying out or improving streets, it cannot afterwards refuse to pay the money to those entitled, on any ground of prior dedication[3] or of irregularity in its own action.[4] Nor after the money has been paid over, or the benefits appropriated without objection,[5] can the landowner allege that the work was done in violation of law, in the absence at least of evidence of mistake or ignorance of the facts on his part when he took the money or had the benefits.[6]

Generally speaking, perhaps the levying and enforcing payment of taxes by sale of property estops the municipality or state to claim the property.[7] But a municipal corporation is

[1] Mr. Justice Coleridge said in substance: The plaintiff says that the articles are now goods and chattels, and therefore trover lies; but the defendants have wrongfully made them such, and may not defend their distress by an unlawful act. It was like the case of money had and received, where the plaintiff's goods had been wrongfully taken and sold. The action to a certain extent assumed the legality of the sale; but still the plaintiff might say that the property was not in the vendor.

[2] Reed *v.* Peterson, 91 Ill. 288.

[3] Princeton *v.* Templeton, 71 Ill. 68.

[4] Bloomington *v.* Brokaw, 77 Ill. 194; Higgins *v.* Chicago, 18 Ill. 276.

[5] Taber *v.* Ferguson, 109 Ind. 227; Union Ins. Co. *v.* Slee, 123 Ill. 57; Corry *v.* Gaynor, 22 Ohio St. 584; Rector *v.* Board of Improvement, 50 Ark. 128, 131, showing that silence in these, as in other cases, without a duty to speak is not enough alone to raise the estoppel.

[6] Hartshorn *v.* Potroff, 89 Ill. 509; Kile *v.* Yellowhead, 80 Ill. 208; Town *v.* Blackberry, 29 Ill. 137. See Rees *v.* Chicago, 38 Ill. 322. But entering a private drain into a city sewer, and agreeing to make no claim against the city for damages on account of the work, will not estop the party from objecting to an assessment for laying the sewer. Sheehan *v.* Fitchburg, 131 Mass. 523.

[7] American Emigrant Co. *v.* Iowa Land Co., 52 Iowa, 323; Audubon Co. *v.* American Emigrant Co., 40 Iowa, 460; Simplot *v.* Dubuque, 49 Iowa, 630; Adams Co. *v.* B. & M. R. Co., 39 Iowa, 507; Brandriff *v.* Harrison, 50 Iowa, 164.

not estopped to claim property belonging to it where it has been improperly sold for taxes as the property of a person who had no title to or possession of it,[1] or where no one's rights will be wrongfully affected by repudiating the sale; as where the purchaser knew of the claim of the corporation.[2] In Rossire *v.* Boston, which was a writ of entry, the city of Boston, defendant, had become absolute owner of the land in question by virtue of a mortgage (which had been foreclosed) and the expiration of the equity of redemption; and the city had been in possession ever since the foreclosure. Before the equity of redemption had expired the land had been conveyed to one Pond, and the assessors had taxed it as his and sold it as his for non-payment of the taxes. The demandant derived title from the purchaser. Judgment was given for the tenants. The ground taken by the court was that the assessors and collector were not to be regarded as mere private agents of the city,[3] and their acts in the premises therefore were not binding on the city.

A remarkable case, to be received with hesitation, may now be noticed. It has been laid down that persons who have procured the passage of an act of the legislature under which they have acted and obtained benefits are estopped to show that the act was unconstitutional,[4] though it may have been so

[1] Rossire *v.* Boston, 4 Allen, 57.

[2] Howard Co. *v.* Bullis, 49 Iowa, 519. See Buena Vista Co. *v.* Iowa Falls R. Co., 46 Iowa, 226; Bixby *v.* Adams Co., 49 Iowa, 507. Of course the mere assessment of a tax creates no estoppel upon the municipality to claim the property. Page Co. *v.* B. & M. R. Co., 40 Iowa, 520. Nor will mere suit to set aside a conveyance of land by a municipality estop it to tax the land pendente lite. American Emigrant Co. *v.* Iowa Land Co., 52 Ill. 323.

[3] Walcott *v.* Swampscott, 1 Allen, 101; Buttrick *v.* Lowell, ib. 172; Kimball *v.* Boston, ib. 417.

[4] Ferguson *v.* Landram, 5 Bush, 230; s. c. 1 Bush, 548; Daniels *v.* Tearney, 102 U. S. 415, 421; Vose *v.* Cockcroft, 44 N. Y. 415, 424. See also State *v.* Mitchell, 31 Ohio St. 592; Tone *v.* Columbus, 39 Ohio St. 281; Motz *v.* Detroit, 18 Mich. 526; Todd *v.* Kerr, 42 Barb. 317; People *v.* Murray, 5 Hill, 468; Van Hook *v.* Whitlock, 26 Wend. 43; Lee *v.* Tillotson, 24 Wend. 337; Burlington *v.* Gilbert, 31 Iowa, 356; B. C. R. & M. R. Co. *v.* Stewart, 39 Iowa, 267; Tallant *v.* Burlington, ib. 543; Mitchell *v.* Horton, 75 Iowa, 271. In ordinary cases, however, perhaps generally where benefits have not been appropriated and retained by the party seeking to deny the constitutionality of the law, there can be no estoppel to deny the validity of a statute. South Ottawa *v.* Perkins, 94 U. S. 260; Counterman *v.* Dublin, 38 Ohio St. 515, 517; Tone *v.* Columbus, supra; State *v.* Little Rock R. Co., 31 Ark. 701. 'There can be no estoppel,' says the court in South Ottawa *v.* Perkins, supra, 'in

pronounced by the courts concerning those who had not participated in its passage.[1] In the case referred to it appeared that a large portion of the people of Gallatin County, Kentucky, had met in the year 1864 and resolved to raise $20,000 to be used as a fund to avoid the draft for soldiers. They appointed a committee to obtain an act of the legislature authorizing the county to issue bonds for the amount mentioned, and to levy a tax to pay the money. The money was borrowed; the volunteers were obtained; an act of the legislature was procured authorizing the proceedings; the bonds were issued; and the tax was levied. Certain parties who had aided in obtaining the act now prayed an injunction to restrain the collection of the tax; but the prayer was refused.[2]

the way of ascertaining the existence of a law. That which purports to be a law of a state is a law or is not a law according as the truth of the fact may be, and not according to the shifting circumstances of parties.' But this is not said of persons who had procured the passage and received and retained the benefits of a law. And perhaps there may be other exceptions. See e. g. Daniels *v.* Tearney, 102 U. S. 415, 421; Strosser *v.* Fort Wayne, 100 Ind. 443, 452. It is held that a tax-collector cannot set up the invalidity of a statute in bar of an action for money which he has collected for the plaintiff under such statute. Perryman *v.* Greenville, 51 Ala. 507.

[1] Ferguson *v.* Landram, 1 Bush, 548. The case under consideration, it will be seen, is not one of misrepresentation, involving the rights of innocent parties who have acted thereon, but virtually a question between agent and principal.

After one has submitted claims to decision under a statute, and the claims have not been withdrawn but have been passed upon, and especially if dividends have been accepted, one cannot allege the unconstitutionality of the statute. Fogler *v.* Clark, 80 Maine, 237; Daniels *v.* Tearney, 102 U. S. 415, 421; Gilman *v.* Lockwood, 4 Wall. 234; Baldwin *v.* Hale, 1 Wall. 223; Chapman *v.* Forsyth, 2 How. 202; Clay *v.* Smith, 3 Peters, 411; Bucklin *v.* Bucklin, 97 Mass. 256; Morse *v.* Lowell, 7 Met. 152. The cases contra, as e. g. Kimberly *v.* Ely, 6 Pick. 440, have been overruled. The rule would probably be the same if no dividends were received or if the claims were rejected altogether. That, however, would be on the ground of res judicata. See ante, p. 81.

[2] 'Upon what principle of exalted equity,' said the court, 'shall a man be permitted to receive a valuable consideration through a statute procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute as unconstitutional? Suppose five hundred citizens of Gallatin County had come together and by written agreement authorized certain gentlemen as their agents to borrow $20,000 to be used for raising volunteers to prevent themselves and relatives from being conscripted, is there any doubt that those loaning the money could recover it by personal action from them? . . . If they could then bind themselves personally and collectively without a statute, but to render the collection more secure, less uncertain as to the recipients, and more equitable, they should agree, instead of

A similar doctrine has been held in respect of one who had joined in a petition for the opening or improvement of a street; such a one will, it is said, be afterwards estopped to allege that the levy of a tax to pay for the improvement was unauthorized on the ground that the number of abutters required by law did not join in the petition.[1] This position is not generally ac-

giving their personal obligations, to procure an enactment to compel each one to contribute according to the amount of his property, and constitute the county court their agent to determine this, and have the proper assessment made and collected from each, by what rule of equity or law should they be permitted to withdraw their assent to this assumed liability and agency, though it be evidenced by a statute instead of a mere personal contract? . . . In procuring this money and obtaining with it volunteer soldiers these men violated no law of morality or of government. Their contract was not void for want of consideration or for illegality; but it is the *means* by which the sum for its reimbursement is to be raised that they assail. Whilst the borrower and lender of money at usurious rates both violate law, of course there is neither consideration nor estoppel as to the usurious loan; but if the borrower induces a third and innocent party to take the note, he is then estopped, because his conduct becomes fraudulent as to this third party. . . . Suppose the legal voters of a town should petition the legislature to grant a charter for a manufacturing company, authorize them to organize it by electing officers, and confer on them the power to borrow a given sum to be reimbursed by the levy of an annual tax, and that each should have stock according to what he paid of this tax; whilst this statute would be clearly invalid and unenforceable against such as neither petitioned nor voted for the officers, yet as to such as did, very different considerations and questions would arise. For after voluntarily asking the legislature to provide by law an agent for them, and after appointing that agent, by what rule of law or ethics could they be permitted to repudiate their agent and deny their responsibility to those who may have loaned the money? All persons who were themselves liable to draft, or had minor sons or slaves so liable, divided an actual valuable consideration by the avoidance of the draft, and hence are liable. Those who participated in the procurement of the law, or afterwards voluntarily ratified it, cannot be heard now to object, especially such as had relatives liable to be conscripted; because having voluntarily waived this constitutional benefit, they shall not be heard to set it up after the money is procured, the volunteers obtained, and the war ended.'

[1] Burlington *v.* Gilbert, 31 Iowa, 356. People *v.* Goodwin, 5 N. Y. 571, and Kellogg *v.* Ely, 15 Ohio St. 66, were cited in support of the doctrine; but it may be doubted if they are in point. In re Sharp, 56 N. Y. 257; Tone *v.* Columbus, 39 Ohio St. 281, 298, denying Burlington *v.* Gilbert, supra. See also Gilmore *v.* Fox, 10 Kans. 509. Joining in a petition for a public improvement, accepting an appointment as an officer to hold an election of commissioners for carrying it out, and requesting the municipality to assume payment of bonds in aid of it, were held to estop the party to object to the validity of an assessment on his property to pay for the same, in Ferson's Appeal, 96 Penn. St. 140. Acquiescence by property owners for seven years in proceedings taken for annexing territory, and voting meantime for officers of the municipality, who contract debts for carrying out the improvements involved in the matter, are held

cepted.[1] It has well been declared that citizens who have petitioned for the making of an improvement have still the right to assume that things will be done lawfully, that they are not bound to take notice of illegal proceedings on the part of the municipality, and therefore are not estopped by their silence to object to them.[2]

In accordance with the Kentucky doctrine one who as a member of a corporation advocates or votes [3] for an assessment which is made will be estopped to deny the validity of the same, so far as that turns upon mere irregularity; though it is not enough to show his mere presence at the meeting.[4] Upon the same principle persons who petition a town to let a contract for certain work cannot object to the levy of a tax to pay for the work by alleging irregularities in the contract when the facts were known by them at the time and passed without objection.[5] But it is held that a landowner on whom an assessment for the extension of a street has been laid under the statute is not estopped to petition for a jury to revise the assessment by reason of his having asked for an apportionment thereof under the same statute.[6] So too one who did not assent to irregularities in proceedings for which one petitioned may assert them after-

to estop the owners from asserting the invalidity of the business. Logansport *v.* La Rose, 99 Ind. 117, 132. See also Hickling *v.* Wilson, 104 Ill. 54.

An error in the proceedings of a body committed at the instance of a party and in his favor cannot afterwards be set up to impeach the validity of such proceedings. Scott *v.* Board of Commissioners, 101 Ind. 42.

[1] Steckert *v.* East Saginaw, 22 Mich. 104; Tone *v.* Columbus, 39 Ohio St. 281, 298. See Greencastle *v.* Black, 5 Ind. 557; Strosser *v.* Fort Wayne, 100 Ind. 443, 446; Hightower *v.* Overhaulser, 65 Iowa, 347.

[2] Cases just cited; In re Sharp, 56 N. Y. 257. The analogy of the cases in the Supreme Court of the United States, ante, p. 376, is by no means complete, for the contest in them was between the municipality and innocent purchasers for value; while here it is between the municipality and its own citizens, — between agent and principal.

[3] But see Strosser *v.* Fort Wayne, 100 Ind. 443, 445.

[4] Ridgefield *v.* Reynolds, 46 Conn. 375; Thatcher *v.* People, 98 Ill. 632; Cross *v.* Kansas, 90 Mo. 13. The burden is upon the person alleging the estoppel to show the other party's active favor of the assessment. Ridgefield *v.* Reynolds, supra.

[5] Patterson *v.* Baumer, 43 Iowa, 477; Kellogg *v.* Ely, 15 Ohio St. 64; Motz *v.* Detroit, 18 Mich. 495.

[6] Gardner *v.* Boston, 106 Mass. 549. See also to the same effect Nicodemus *v.* East Saginaw, 25 Mich. 456; Steckert *v.* East Saginaw, 22 Mich. 104; In re Sharp, 56 N. Y. 257; Canfield *v.* Smith, 34 Wis. 381. See further Damp *v.* Dane, 29 Wis. 419.

wards.[1] And it has lately been held by the Supreme Court of the United States that a municipality is not estopped to question the constitutionality of an act authorizing it to tax its citizens even after having acted under the law for one year.[2]

Many of the cases upon this subject, it will be noticed, are simply cases of ratification or acquiescence;[3] and it is a questionable use of terms, as we have seen,[4] to apply the word 'estoppel' to them. A few more cases will serve to enforce this observation. Thus, if heirs of age join in a deed of quitclaim with a trustee of the ancestor's real estate, to complete title made by a previous deed executed by the trustee, it is said that they will thereafter be 'estopped' from contesting the validity of that earlier deed.[5] So if a man assent with knowledge of the facts to the appropriation by an officer of the law of moneys arising from a judicial sale, he will be estopped thereafter from objecting.[6] Taking proceedings to enforce a contract amounts also to a conclusive recognition of the validity of the contract,[7] until such proceedings, at all events, are discontinued.[8] So if one perform acts required to be done by a written instrument purporting to be signed by him, he will be estopped to deny his execution of it.[9] On the other hand, a corporation is not estopped to sue upon the bond of its treasurer for unfaithfulness and misappropriation of funds by having accepted the report of an auditing committee which approved his accounts, or by making a report founded thereon to the legislature.[10] Nor are supervisors estopped by auditing and paying part of a claim to dispute the party's right to the rest, though

[1] Taylor *v.* Burnap, 39 Mich. 739.

[2] Loan Association *v.* Topeka, 20 Wall. 655.

[3] See also Frick *v.* Trustees of Schools, 99 Ill. 167, long acquiescence; Kimball *v.* Lee, 40 N. J. Eq. 403, acquiescence; Perry *v.* Cheboygan, 55 Mich. 250, acquiescence; Waldron *v.* Toledo Ry. Co., ib. 420, acquiescence; Skinner *v.* Grace Church, 54 Mich. 543, ratification; Proskauer *v.* People's Sav. Bank, 77 Ala. 257, laches; Burk *v.* Simonson, 104 Ind. 173, acquiescence, with change of position; Sewall *v.* Hebert, 37 La. An. 155, ratification; Wray *v.* Davenport, 79 Va. 19, acquiescence.

[4] Ante, p. 456.

[5] Vallette *v.* Bennett, 69 Ill. 632.

[6] McConnell *v.* People, 71 Ill. 481.

[7] Metropolitan Ry. Co. *v.* Chicago R. Co., 87 Ill. 317.

[8] Comp. State *v.* Adams, 71 Mo. 620.

[9] Boggs *v.* Olcott, 40 Ill. 303.

[10] Lexington R. Co. *v.* Elwell, 8 Allen, 371. See Dunnell Manuf. Co. *v.* Pawtucket, 7 Gray, 277.

this involves denying the validity of the payment already made.[1]

So far as the term 'estoppel' is used as a synonyme in such cases with 'bar' or 'preclusion,' there is no great objection to its use;[2] the objection to using it in cases of ratification and the like is that it is misleading. Ratification and acquiescence suppose the existence of something incomplete in regard to its legal consequences; hence they cannot be a *kind* of estoppel in themselves. At most they are but facts which may serve to supply something otherwise wanting to an estoppel.[3]

[1] People v. New York, 1 Hill, 362.

[2] See Meyer v. Mitchell, 75 Ala. 475, for such a use of the term, in regard to fraud.

[3] The term 'estoppel' has also been applied to mere questions of the admissibility of parol evidence to vary the terms of a written contract. Thus, it is sometimes said that by contracting with persons jointly the other party is estopped to treat them as severally liable. Sprigg v. Bank of Mt. Pleasant, 10 Peters, 257; s. c. 14 Peters, 201. See also Cox v. Thomas, 9 Gratt. 312.

PART IV.

PROCEDURE.

PART IV.

PROCEDURE.

CHAPTER XXII.

PLEADING THE ESTOPPEL.

It has been an unsettled point in practice whether the estoppel of a record or of a deed is available if not pleaded. It was said in one of the leading cases[1] that the judgment of a court of competent jurisdiction was as evidence conclusive; while in another leading case[2] the doctrine was maintained that the estoppel of a record was removed by the failure to plead it, and that the jury were in such a case at liberty to find according to the truth of the matter. And the same position was taken in an earlier case[3] by Lord Coke in regard to the estoppel of a deed. In this case, an action on a bond, that great judge said: 'The obligee in pleading cannot allege the delivery before the date . . . because he is estopped to take an averment against anything expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped because they are sworn to say the *truth*.'

The whole doctrine that a record or deed should be pleaded in order to the estoppel appears to have been founded on this case; and the tendency of both the English and the American courts seemed for a long time to be towards this position.[4] But

[1] Duchess of Kingston's Case, ante, p. 91.

[2] Vooght *v.* Winch, 2 Barn. & Ald. 662.

[3] Goddard's Case, 2 Coke, 4.

[4] See notes to Duchess of Kingston's Case, 2 Smith's L. C., Am. ed.; Foye *v.* Patch, 132 Mass. 105. So still in

whatever may have been law in Lord Coke's time, it has well been said that the jurors are not in modern times sworn to say the truth, but a true verdict to give *according to the evidence.*[1] And as the learned writer referred to further says, it is indeed difficult to see in what manner the oath of a juror can be opposed to the rule that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it; and that all the evidence being thus one way, namely, with the record, the jury (by reason of their oath) should not be bound to give their verdict for the party with whom all the evidence is, and against the party with whom there is no evidence.[2] This seems sufficient to overturn the rule in Goddard's Case, and with it the many cases holding the same position on both sides of the Atlantic. The tendency of the decisions has also been strongly the other way since Mr. Smith's work was published, especially in America.[3] The fail-

some States. Meiss *v.* Gill, 44 Ohio St. 253; Fanning *v.* Insurance Co., 37 Ohio St. 344; Burlington *v.* Merchants' Bank, 68 Iowa, 343. See Crawford *v.* Nolan, 70 Iowa, 97, 99; infra, p. 701. And see Everest & Strode, Estoppel, ch. 11, where the English practice is intelligently stated.

[1] It should be remembered, however, that the transition into the modern jury system had not been fully accomplished in the time of Lord Coke, and that under the system which had previously existed jurors were themselves witnesses, and *were* sworn as such to speak the truth. 2 Reeves's Hist. English Law, 164, 540, note (Finl. ed.); 3 ib. 305, note.

[2] Mr. Smith's note in his Leading Cases to the Duchess of Kingston's Case.

[3] See note of American editors to Duchess of Kingston's Case, 2 Smith's L. C.; Foye *v.* Patch, 132 Mass. 105; Insurance Co. *v.* Harris, 97 U. S. 331, 336; Fowlkes *v.* State, 14 Lea, 14. Mr. Smith himself thought that the English cases might be reconciled. 'It is submitted,' he says in his note to the Duchess of Kingston's Case, 'that the cases of Vooght *v.* Winch [supra] and Doe *v.* Huddart [2 Cromp. M. & R. 316] are by no means at variance with the doctrine of De Grey, C. J. viz., that a judgment on the same point between the same parties is in pleading a bar, in evidence conclusive. And it is submitted that the true meaning of this is that it is conclusive as a plea where there is an *opportunity* of pleading it, but that where there is no such opportunity, then it is conclusive as evidence; and that Vooght *v.* Winch and Doe *v.* Huddart merely decide that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing so.' This distinction has often been suggested; but it does not go far enough. The only consistent rule against the estoppel would be to exclude evidence of it altogether when an opportunity to plead it was not availed of; a course required by statute in some of the states. Wood *v.* Ostram and Ransom *v.* Stanberry, infra; Greaves *v.* Middlebrooks, 59 Ga. 862; Burlington R. Co. *v.* Harris, 8 Neb. 140; Hanson *v.*

ure to plead specially may properly on the general principles of pleading prevent a party from giving evidence on the point; but if the evidence be admissible, there is no good reason why the jury should not be required to accept the conclusion of law concerning it.

It is well settled at common law that an estoppel in pais need not be pleaded;[1] but this rule has been changed by statute in some of the states.[2] The effect of the statutes, however, is not to declare that the facts when not pleaded should be found according to the truth, but that they are inadmissible in evidence.[3] In any case, however, if the estoppel be pleaded, it should be pleaded with certainty.[4] Nothing will be supplied by intendment in favor of an alleged estoppel; if room is left for inference, that will be against the estoppel.[5]

In Virginia it is held that a replication of estoppel is necessary where there is a special plea in defence; while if the general issue has been pleaded, the estoppel need not be pleaded in reply.[6] But questions of pleading the estoppel turn so much upon statutes or local practice that general rules cannot be laid down with safety. It is enough for the present to say in gen-

Chiatovich, 13 Nev. 395. See, further, Krekeler *v.* Ritter, 62 N. Y. 372; Briggs *v.* Bowen, 60 N. Y. 454. But it is clear that the facts are available as an estoppel where there was no opportunity to plead them. Foye *v.* Patch, 132 Mass. 105; Clink *v.* Thurston, 47 Cal. 21; Gans *v.* St. Paul Ins. Co., 43 Wis. 108.

[1] Chitty's Precedents, 407; Everest & Strode, Estoppel, 390, 402; Freeman *v.* Cooke, 2 Ex. 654, 662; Sanderson *v.* Collman, 4 Man. & G. 209; Lyon *v.* Reed, 13 Mees. & W. 285; Coleman *v.* Pearce, 26 Minn. 123; Turnipseed *v.* Hudson, 50 Miss. 429, 435; Mayer *v.* Ramsey, 46 Texas, 371; Guffey *v.* O'Reiley, 88 Mo. 418.

[2] Wood *v.* Ostram, 29 Ind. 177; Anderson *v.* Hubble, 93 Ind. 570; Clauser *v.* Jones, 100 Ind. 123; Wood *v.* Nicholls, 33 La. An. 744; Ransom *v.* Stanberry, 22 Iowa, 334; Phillipps *v.* Van Schack, 37 Iowa, 229; Noble *v.* Blount, 77 Mo. 235, 242; Hammerslough *v.* Cheatham, 84 Mo. 13; Dale *v.* Turner, 34 Mich. 405; Warder *v.* Baldwin, 51 Wis. 450.

[3] Wood *v.* Ostram, 29 Ind. 177; Ransom *v.* Stanberry, 22 Iowa, 334; Delphi *v.* Startzman, 104 Ind. 343; Robbins *v.* Magee, 76 Ind. 381.

[4] Texas Banking Co. *v.* Hutchins, 53 Texas, 61.

[5] Robbins *v.* Magee, 76 Ind. 381, 391; Cole *v.* Lafontaine, 84 Ind. 446, 448; Wood *v.* Ostram, 29 Ind. 177; Stewart *v.* Beck, 90 Ind. 458; Anderson *v.* Hubble, 93 Ind. 570, 578; Troyer *v.* Dyar, 102 Ind. 396; Gilbreath *v.* Jones, 66 Ala. 129. Hence, if a party is to be estopped by a writing, the original or a copy should be annexed, or at least enough to show clearly the facts upon which the estoppel is to be founded. Ashley *v.* Foreman, 85 Ind. 55, 61.

[6] Hayes *v.* Virginia Protection Assoc., 76 Va. 225.

eral that a plea of estoppel of any kind, when made, should claim that the opposite party should not be admitted to make use of what the supposed estoppel would exclude.[1]

We proceed now to the consideration of the form and manner of pleading by way of estoppel, and to the matter of estoppels arising on the pleadings or in the course of the conduct of causes by reason of the action of the parties pending the litigation itself. The subject will be considered in the order of the three divisions of estoppel, as already presented. And first, of questions of pleading and evidence in estoppels by record.

[1] Whittemore v. Stephens, 48 Mich. 573, 578.

CHAPTER XXIII.

ESTOPPEL BY RECORD.

THE proper plea of the general issue to an action upon a judgment of a court of record is nul tiel record. The plea of nil debet would admit the existence of the record, and at the same time deny the correctness of the judgment. The same is true in respect of judgments of the sister states.[1] But in the case of judgments of foreign countries, as these are not technically records the proper way would be to plead nil debet or the special matter which shows that the judgment is void.[2]

If the plea deny a record in the *same* court, the replication thereto should reassert the existence of the record and conclude with a prayer that it may be viewed and inspected by the court, and then a day is given to the parties.[3] And when the record of *another* court is denied, the replication reasserts it, and a day is given to the plaintiff to bring it in. When the *defendant* has pleaded a record of the same court, the replication denying it concludes (or concluded under the old practice) with a verification, a day being given to the parties to hear judgment; and where the defendant has pleaded a record of another court, the replication of nul tiel record may either conclude by giving the defendant a day to bring it in, or with an averment and prayer of the debt and damages.[4] In the former case the issue is complete upon the replication; but in the latter there should be a rejoinder, reasserting the existence of the record; and hence the first form being the more concise is preferable.[5]

The burden of proof rests as a matter of course upon the party who sets up the judgment to show that it is a bar to the ac-

[1] Ante, pp. 268–270.
[2] 1 Chitty, Pleading, 485.
[3] 1 Chitty, Pleading, 600; Share *v.* Becker, 8 Serg. & R. 293.
[4] 1 Chitty, Pleading, 600; Share *v.* Becker, 8 Serg. & R. 293; 3 Black. Com. 330, 331.
[5] Ibid. See the precedents, post, pp. 726 et seq.

tion;[1] but it has become the settled practice in declaring upon a judgment to allege generally that the plaintiff by the consideration and judgment of the court recovered the sum mentioned therein, and not as formerly to set out the whole of the proceedings.[2] The judge may look into the pleadings themselves of the former trial, though not now set out in full, to see whether a plea of res judicata can be sustained,[3] or he may hear evidence on the point when the pleadings are not decisive.[4]

But in pleading or replying a judgment as an estoppel to an action or allegation more minuteness must be observed.[5] It must now be made to appear that precisely the same matter was in issue at the former trial as that now in question, and that the judgment was rendered on the merits,[6] or there can be no estoppel.[7] If the record pleaded does not show that the fact in question was in issue or necessarily involved in the verdict or decision, the fact should be shown in the pleading. Thus, if a plea of judgment in favor of the defendant in detinue, on issue of not guilty, does not allege that the verdict was because of want of possession, it will be fatally defective in a subsequent action of trover between the parties.[8]

Such exactness in the case of a plea may, however, be escaped by pleading, when permissible, the general issue. This is seen in Phillips *v.* Berick.[9] The plaintiff sued for work and labor done, and after a plea of non assumpsit offered to prove that the defendant was indebted to him for services rendered prior to March 8, 1817. But the defendant objected, and produced the record of a judgment rendered at the September term, 1817, upon a debt to the same plaintiff alleged to have arisen on the 8th of March, 1817. He, however, went too far, contending that this record precluded the plaintiff from giving evidence of any

[1] Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Zoeller *v.* Riley, 100 N. Y. 102; Pruitt *v.* Holly, 73 Ala. 369.

[2] Biddle *v.* Wilkins, 1 Peters, 686; Houstoun *v.* Sligo, 29 Ch. D. 448.

[3] Houstoun *v.* Sligo, 29 Ch. D. 448.

[4] Ante, p. 87.

[5] In equity a judgment should be pleaded by full and proper averments. Jourolmon *v.* Massengill, 86 Tenn. 81.

[6] Fowlkes *v.* State, 14 Lea, 14.

[7] Temple *v.* Williams, 91 N. Car. 82, 91; Gilbreath *v.* Jones, 66 Ala. 129.

[8] Gilbreath *v.* Jones, 66 Ala. 129. See Chamberlain *v.* Gaillard, 26 Ala. 504.

[9] 16 Johns. 136.

demand for service arising before that time. This would have been to better his case by not pleading specially. Mr. Justice Spencer said that the question was whether a recovery by the plaintiff for services rendered prior to March 8, 1817, was a bar to any other claim for services performed before that time, though it should be made to appear, not only that it was not the same work for which a recovery had already been had, but that it was an entirely different piece of service. He said that it had been decided that a recovery in a former action, apparently for the same cause, was only prima facie evidence that the matter of the subsequent demand had been tried; it was not conclusive.[1] The plaintiff would be required, however, to show clearly and satisfactorily that the services for which he sought to recover were not the same as those embraced in the former suit, and that they grew out of a distinct contract; for if a man labored for another a year under the same contract, he could not split up the demand and sue for each day's work.[2]

This doctrine that parol evidence is admissible, in the silence of the record, to prove or disprove the identity of the matter in litigation with that of the former adjudication is, as we have elsewhere seen, well settled.[3] Though the particular matter may not have been the primary subject of litigation, yet if the necessary issues in the former case drew it in, the adjudication upon it will, by the better rule, be conclusive.[4]

[1] Snider *v.* Croy, 2 Johns. 227; Seddon *v.* Tutop, 6 T. R. 607.

[2] 'If we test the rule we have laid down,' he proceeded to say, 'by the rules of pleading, the same result will be found. The defendant, had he pleaded specially, must have stated a former recovery. . . . The replication would be that the promises in this action were not the same identical promises for the non-performance whereof the plaintiff had not recovered by the said judgment. This would have formed an issue to the country; and the inquiry in pais would be whether the former recovery included the demand now in contest; and the burden of proof would be thrown on the plaintiff. The record would be prima facie evidence for the defendant; and this the plaintiff would have to meet and overthrow by showing for what the former recovery was, and that the claim set up anew had not been submitted to the jury and was a distinct transaction, not so identified with the former suit as to render it an entire contract, incapable of subdivision.'

[3] Supples *v.* Cannon, 44 Conn. 424; Fowlkes *v.* State, 14 Lea, 14; Chamberlain *v.* Gaillard, 26 Ala. 504; Gilbreath *v.* Jones, 66 Ala. 129, 133; Perkins *v.* Walker, 19 Vt. 144; Gardner *v.* Buckbee, 3 Cowen, 121; Burt *v.* Sternburgh, 4 Cowen, 559. See United States *v.* Lane, 8 Wall. 185; ante, p. 87.

[4] Gilbreath *v.* Jones, 66 Ala. 129,

In regard to the matter of form the following plea was held good in a recent case:[1] The declaration was for an injury to the plaintiff's reversion; and the defendant inter alia pleaded that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said that after the accruing of the causes of action in the first count alleged and after the passing of the Chancery Regulation Act the plaintiff commenced his suit and filed his bill in the High Court of Chancery against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the said first count alleged; and such proceedings were thereupon had in the said suit that before the commencement of this suit the said Court of Chancery determined the same alleged causes of action in favor of the defendant, and gave judgment, and decreed in respect thereof in favor of the defendant; and the said judgment and decree still remained in force. The objection to the plea was that it was not specific enough in the statement of the issue in the trial in chancery. Counsel contended that it was necessary to show that the matter did in fact come in issue, and that it was not enough to show that it *might* have come in issue, as they said was the case with the plea in question. But the plea was sustained.[2]

133. See McCalley *v.* Robinson, 70 Ala. 432; Johnston *v.* Riddle, ib. 219.

[1] Langmead *v.* Maple, 18 C. B. N. S. 255.

[2] Willes, J. said that at first he had been disposed to think the plea bad. It was not sufficient to constitute res judicata that the matter has been determined; it must appear that the matter had been controverted as well as determined upon. 'Looking at the pleas,' he proceeded to say, 'it seemed to me that probably the Court of Chancery may not have dismissed the plaintiff's bill on the merits, but judging upon equitable grounds may have considered it not to be a case for an injunction, and may have declined to go into the question whether the plaintiff had any legal right or not. It may have been unnecessary to go into that except for the amount of damages. Therefore the Court of Chancery may have given the go-by to the right now asserted by the plaintiff. But as the plea alleges that the Court of Chancery determined the same alleged causes of action, I think we are bound to assume it to mean that the court decided upon the legal merits against any right of action in the plaintiff in respect of those causes; and as the court had jurisdiction, it might have made a final end of the matter. I can quite conceive that the first view may be the proper one to take on the evidence given. It may appear that the decree was upon the face of it final, and either on the face of the decree or on the evidence if admissible, that the dismissal of the plaintiff's bill proceeded upon grounds peculiar to the Court of Chancery, and

In respect of judgments of foreign countries a plea of judgment recovered in a foreign nation must show that the court had jurisdiction, and that the judgment was final and conclusive where given.[1] And in the case of an action upon a foreign judgment the declaration should set out the same facts.[2] With regard to judgments of the sister American states presumptions arise in favor of the record under the same circumstances[3] as in the state in which the judgment was rendered; and it would seem to follow that the same rules of pleading should prevail in both cases. It has been held in a late case[4] in an action upon a judgment rendered in another state, which would have been invalid by the law of the state in which it was sought to be enforced, that it must be shown that the judgment was valid where rendered. But whether it was necessary that this fact should be alleged in the declaration was not stated. In the case of judgments of inferior courts, as there are no presumptions in their favor, the jurisdiction must be proved; and this is true as well of domestic as of foreign judgments.[5]

In those cases in which a plaintiff has by judgment established his right of action for a recurring liability[6] he should declare as upon a new cause, leaving the judgment to be used in evidence to establish his general right. Thus, in regard to a second suit for a continuing nuisance Mr. Justice Rogers[7] says that the plaintiff should file his declaration for the *continuance*, and not for the same cause of action involved in the first suit; and then the verdict and judgment in the former action, given in evidence

that this matter was not disposed of. But on looking at the plea, for the reasons mentioned I think I must assume that the Court of Chancery did dispose of the legal merits, and that the plaintiff has no right to ask this court to come to a different decision on the same matter.'

[1] Frayes *v.* Worms, 10 C. B. N. S. 149; Plummer *v.* Woodburne, 4 Barn. & C. 625; Douglas *v.* Forrest, 4 Bing. 686. Comp. ante, pp. 253, 288–290.

[2] Ibid.; Nouvion *v.* Freeman, 37 Ch. D. 244, C. A., Cotton, L. J.

[3] But not in all cases to the same extent. Thus, it has lately been decided by the Supreme Court of the United States that the allegations of the record as to the facts concerning jurisdiction are only prima facie evidence. Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaslight Co., 19 Wall. 58.

[4] Crafts *v.* Clark, 31 Iowa, 77.

[5] Cole *v.* Stone, Hill & D. 360; Thomas *v.* Robinson, 3 Wend. 267. See ante, p. 205.

[6] Ante, pp. 172, 173.

[7] In Smith *v.* Elliott, 9 Barr, 345.

(the subject of the nuisance and the parties being the same), are conclusive of the damages to the commencement of the writ, and of the right. All that is then required of the plaintiffs is to prove that the nuisance remains in the same or in a more or less damaging condition than before. However, in Massachusetts and in Ohio judgment in cases of nuisance like this is treated as but prima facie evidence of the plaintiff's right.[1]

If an estoppel by record appear plainly in a pleading the nature of which is opposed to the estoppel, the opposite party may demur; he is not bound to answer.[2] And it matters not whether the judgment relied upon was rendered before or after the action was begun in which it is invoked.[3]

The estoppel by record is legal, and hence, to give a court of equity jurisdiction to entertain it, it would be necessary to show some equity apart from the estoppel.

[1] Standish *v.* Parker, 2 Pick. 20; s. c. 3 Pick. 288; Richardson *v.* Boston, 19 How. 263; Courtland *v.* Willis, 19 Ohio, 142.

[2] Greenup *v.* Crooks, 50 Ind. 410.

[3] Jessup *v.* Carnegie, 80 N. Y. 441; Allis *v.* Davidson, 23 Minn. 442; Poorman *v.* Mitchell, 48 Mo. 45.

CHAPTER XXIV.

ESTOPPEL BY DEED.

QUESTIONS peculiar to pleading and practice in relation to estoppels by deed have not arisen so often as in the other divisions of the subject, and we are unable to present the subject very fully without repeating what has been said before. The following are the most important matters.

When the matter which operates as an estoppel appears on the face of a pleading, the opposite party may demur to a plea by which the defendant attempts to set up such matter as a defence.[1] Thus, if in covenant on a lease by the lessor the defendant plead nil habuit in tenementis, that is in effect that the lessor had no title to or interest in the land, the plea will be bad because the matter of estoppel, to wit, the demise by deed and the holding thereby, appear in the declaration. But where the action upon a lease is brought by a party who claims derivatively from the lessor, in which case the declaration should show the lessor's title and the derivative title of the plaintiff, it is competent to the defendant, as we have elsewhere seen,[2] to deny that the lessor had the particular title alleged in the declaration.[3] The demurrer should, it seems, be special.[4]

If the matter of estoppel do not appear from the previous pleading, the replication should expressly show and rely on such matter; and it is advisable to have an appropriate commencement and conclusion to the replication; for by replying an estoppel without relying upon it the advantage of the estoppel,

[1] Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464.

[2] Ante, pp. 536 et seq.

[3] 1 Chitty, Pleading, 603.

[4] Oregonian Ry. Co. *v.* Oregon Ry. Co., 10 Sawy. 464. E. g. that the defendant ought not to be heard to say or allege that the plaintiff is not a corporation or has no power to make the contract sued upon, contrary to his acknowledgment and deed, as appears by the declaration and is admitted by the plea. Ibid.

where the rules of pleading are strictly enforced, might sometimes be lost.[1] As (under the old law [2]) where in debt for rent on a demise by indenture by one who has nothing in the land (the declaration not showing the deed) the defendant pleads nil habuit in tenementis, if the plaintiff reply that he had a sufficient estate to make the demise, he would lose, according to technical rules, the benefit of the estoppel; but if he should reply that the lease was made by *indenture*, and conclude unde petit judicium if the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, the defendant would be estopped.[3]

The estoppel by deed is a legal estoppel, and therefore always available at law. To give a court of equity jurisdiction to entertain it, it would then be necessary to show some ground of jurisdiction apart from the estoppel.

[1] 1 Chitty, Pleading, 608.
[2] See ante, p. 507.
[3] 1 Chitty, ut supra. See Davis v. Shoemaker, 1 Rawle, 135.

CHAPTER XXV.

ESTOPPEL IN PAIS.

A PLEA of estoppel by contract, in respect of a fact actually or virtually (if clearly) agreed need go no further, it seems, than to allege a valid agreement as regards the fact, with such other matters as may make that agreement intelligible. If the fact in question, though recited in a contract, is not in law agreed, then a further allegation is necessary, showing that the pleader acted upon it in good faith, believing it to be true, and without notice of anything to the contrary.[1] Again, if the estoppel depends upon the doing of some act in the way of performing the contract, as the giving of possession to the party to be estopped, that fact must be alleged.

A plea of estoppel in pais by misrepresentation[2] should ordinarily show: 1. That the party sought to be estopped has made a representation with the intention of influencing the conduct of the pleader in a manner inconsistent with the claim set up. 2. That the misrepresentation was known by the party making it to be false, and that the pleader did not know that it was false, but, on the contrary, believed it to be true. 3. That the pleader has acted upon such act or declaration. 4. That he will be prejudiced by allowing the truth of the admission to be disproved.[3]

[1] Quære whether this could be answered by an allegation of mistake? See ante, p. 460.

[2] In regard to estoppel in pais arising from waiver, see chapter 20. On pleading an estoppel in pais, see ante, p. 701.

[3] Brown *v.* Brown, 30 N. Y. 519, 541; Plumb *v.* Cattaraugus Mutual Ins. Co., 18 N. Y. 392; Dezell *v.* Odell, 3 Hill, 215. For a more full statement of the elements of this estoppel, see ante, p. 570. Representation of the existence of a consideration to a contract stated and relied upon in a pleading works no estoppel. Chatfield *v.* Simonson, 92 N. Y. 209; Russell *v.* Kierney, 1 Sandf. Ch. 34; Day *v.* Perkins, 2 Sandf. Ch. 359. But as to sworn pleadings and depositions, see ante, p. 571, note 2.

In regard to the evidence required to establish the plea, it is not necessary that that should show or tend to show an intention to *mislead;* enough that it shows or tends to show that the party who made the misrepresentation intended that the same should be acted upon.[1] Indeed, it is not necessary to offer evidence of an *actual* intention that the representation should be acted upon; it is enough to show that the conduct of the party supposed to be estopped or the circumstances of the situation were such as to lead a reasonable man to suppose an intention of that kind. So too it is not required that the pleader should prove that the party who made the representation knew it to be false; it is enough to show that the facts were such as the law requires him to know, or that he made a statement recklessly, not knowing whether it was true or false.[2] On the other hand, it is not in all cases sufficient (all else having been established) for the pleader to show that he was ignorant of the facts and believed the representation to be true, for he too may be required to know the true state of things.[3] In some cases the pleader may show presumptive damage.[4]

Evidence is admissible of facts constituting an estoppel in pais, even against the production of a sealed instrument. In Platt *v.* Squire,[5] a bill in equity, it appeared that Platt, a mortgagee of certain land in question, represented to a third person, under whom the defendant claimed, that the debt for which the mortgage was given had been paid and satisfied, and that the third person was induced by reason of the statement to relinquish an attachment of the mortgagor's goods, and to take a mortgage of the same land to secure the debt. It was held that a mortgage under which the defendant claimed should take priority over that given to Platt;[6] and this too though Platt's mortgage was on record at the time of his misrepresentations. The court said that it was no objection that the title of Platt was by a recorded deed. It was true that title by mortgage deed could not be released by parol. But although the legal

[1] Ante, p. 629. The person who sets up the estoppel has of course the burden of proof in regard to it. Petring *v.* Chrisler, 90 Mo. 649.

[2] Ante, p. 610.

[3] Ante, p. 627.

[4] Ante, pp. 645–649.

[5] 12 Met. 494.

[6] Fay *v.* Valentine, 12 Pick. 40; Dewey *v.* Field, 4 Met. 381.

title might exist as a paper title, the party may not be able to enforce it or to render it effectual. This kind of defence, when offered to control written conveyances or title deeds, was no more obnoxious to the objection of permitting oral evidence to control written evidence than was the ordinary case of setting aside conveyances for fraud upon oral proof.

Where an estoppel in pais turns upon silence, as where it is alleged against the assertion of title to property on the ground that the owner stood by and suffered it to be sold as the property of another, it is necessary to allege clearly the assent of such party to what took place. A statement of information and belief is not enough. In Jones *v.* Cowles[1] a bill was filed in chancery to restrain Cowles from asserting the legal title to certain lands alleged to have been sold to one Ware, under whom the plaintiff claimed, on the ground that he had placed himself in a position which estopped him from asserting such title against the plaintiff. The charge was that the plaintiff's grantor, Arnold Seales, purchased the lands in question of Ware for the sum of $4,000, for which notes were given and a bond for title received. The bill then proceeded as follows: 'Your orator further saith that he is advised and believes that before the said contract of purchase was consummated, the said Thomas M. Cowles, in whom was the legal title, as your orator is informed, said to the said Arnold Seales and Robert J. Ware that the said Ware might sell the said lands to the said Seales, and that he (the said Cowles) would look to the said Ware for the payment of the same; and that the said Cowles in fact stood by and gave his assent, as he believes, to the sale of said lands by the said Ware to the said Seales, he having been advised at the time that a contract had been agreed upon which was to become effectual if he (Cowles) should approve or sanction the sale, which he did do.' The bill then stated that Seales had been induced by the statement made by Cowles to purchase the land; that Seales sold to the plaintiff, and that the plaintiff made the purchase and made valuable improvements on the faith of the assent of Cowles to the sale by Ware. The bill was dismissed.[2]

[1] 26 Ala. 612.

[2] Mr. Justice Goldthwaite, in delivering judgment, now said: 'It will be seen from the statement we have made

The facts constituting an estoppel in pais may, indeed, be ground for filing a bill for a conveyance of real estate or for a further assurance.[1] In Favill *v.* Roberts the plaintiff brought an action for the purpose of compelling the conveyance of a farm which he had purchased of the executor of John Roberts, of whom the defendants were heirs. The land had been sold and paid for under an order of court, and improvements had been made by the plaintiff, when it was discovered that the court had no authority to grant the order for the conveyance of the land. The plaintiff now sought to enforce a remedy against the heirs at law, and to compel a conveyance, on the ground that the executor acted with the consent and approbation of the heirs, and that they encouraged the sale. It was held that the plaintiff was entitled to his remedy.[2]

Generally speaking, estoppels in pais are available as well at law as in equity. This is true even of the so-called 'equitable estoppel;' indeed, it has been laid down that that estoppel is not available as such in equity, but that there must be some equity apart from the estoppel to give a court of equity the right to entertain it.[3] The Statute of Frauds, however, raises a difficulty touching estoppels in pais in regard to land. It is everywhere conceded, indeed, that the title to land can be affected by estoppel in pais arising from fraud. Thus, it is even held that a vendor of land will not be allowed, after representing that there is an alley between two lots of his at the time of selling one of them, to deny the representation after the sale has been made and the representation acted upon; though the deed

of the bill that the equity of the appellant rests entirely upon the conduct of Cowles in giving his assent to the sale by Ware to Seales; and hence it is necessary that the fact should be clearly charged in the bill. But the bill is defective in this, as the fact of the assent is not charged at all. The allegation, as will be seen from the extract we have made, simply is that the complainant was advised and believed that such assent had been given, and this is not enough. See Read *v.* Walker, 18 Ala. 323; McDowell *v.* Graham, 3 Dana, 73. If the allegation we have referred to is struck out there is no other which would create any estoppel on the part of Cowles.'

[1] Favill *v.* Roberts, 3 Lans. 14; s. c. 50 N. Y. 222; Goodman *v.* Winter, 64 Ala. 410; Stone *v.* Tyree, 30 W. Va. 687, 702. Comp. estoppel by deed, ante, pp. 436, 440.

[2] See Stone *v.* Tyree, 30 W. Va. 687, 702; Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316, 327.

[3] Drexel *v.* Berney, 122 U. S. 241. See Moore *v.* Frazer, 15 Oreg. 635.

of conveyance contained no allusion to the alley.[1] Parol dedication is a more familiar illustration. It has been held, however, that the doctrine of estoppel by conduct, where the subject of the representation is the title to real estate or property which can only be passed by deed, though agreed to be available in equity on the ground of fraud, is not available in a suit at law.[2]

The case first cited was an action of ejectment. The plaintiff being seised in fee of the land in controversy, sold it to one Bird, and gave bond to make title on payment of the purchase-money secured by the purchaser's notes. One of these notes the plaintiff indorsed to the defendant; he obtained judgment upon it against the purchaser, who was in possession of the land, and under the instructions of the plaintiff had the execution levied on the land, and at the plaintiff's request purchased it. Afterwards the plaintiff paid the residue of the notes which he had indorsed, and filed a bill in chancery against the purchaser Bird, and had the land sold in payment of the purchase-money. The defendant was not a party to these proceedings. The plaintiff became the purchaser at the sale under the decree, and now brought the present action to recover the land. Upon this evidence the court below instructed the jury that the plaintiff was estopped to assert his title against the defendant; but this judgment was reversed by the Supreme Court.[3] The learned

[1] Kirkpatrick *v.* Brown, 59 Ga. 450.

[2] Doe d. McPherson *v.* Walters, 16 Ala. 714; Hendricks *v.* Kelly, 64 Ala. 388; Thompson *v.* Campbell, 57 Ala. 183; Taylor *v.* Agricultural Assoc., 68 Ala. 229; Hayes *v.* Livingston, 34 Mich. 384; White *v.* Hapeman, 43 Mich. 267; Showers *v.* Robinson, ib. 502, 513; First National Bank *v.* McAllister, 46 Mich. 397; De Mill *v.* Moffatt, 49 Mich. 125; Nims *v.* Sherman, ib. 45; Smith *v.* Mundy, 18 Ala. 182; Wimmer *v.* Ficklin, 14 Bush, 193; Hamlin *v.* Hamlin, 19 Maine, 141; Knight *v.* Wall, 2 Dev. & B. 125; West *v.* Tilghman, 9 Ired. 163; Stockyards *v.* Wiggins Ferry Co., 102 Ill. 514; Blake *v.* Fash, 44 Ill. 302; Mills *v.* Graves, 38 Ill. 455; Swick *v.* Sears, 1 Hill, 17; Delaplaine *v.* Hitchcock, 6 Hill, 14; Townsend Bank *v.* Todd, 47 Conn. 190, 216. See Heard *v.* Hall, 16 Pick. 460; Wade *v.* Bunn, 84 Ill. 117 (equity); Curyea *v.* Berry, ib. 600; Foster *v.* Bigelow, 24 Iowa, 379; Suttle *v.* Richmond R. Co., 76 Va. 284; Nix *v.* Collins, 65 Ga. 219.

[3] Dargan, C. J. (for the court): 'The plaintiff was seised in fee of the premises, and he has executed no deed by which he has transferred the title to another. This is admitted; but it is contended that the conduct of the plaintiff in directing the levy to be made on the land as the property of Bird the purchaser, who held his bond

Chief Justice who delivered the judgment, referring to the cases of parol dedication, said that they were not in point by reason

for title, and requesting the defendant to buy, estops him from asserting his legal title, more especially as the amount bid at the sheriff's sale by the defendant extinguished, to that extent, the liability of the plaintiff as the indorser of the note of Bird to him. If any one having the title to land induce another to purchase it from one who has no title, it is very certain that the legal owner cannot be permitted afterwards to assert his title and defeat the purchaser. Sugden, Vendors, 262. But the question is, In what forum shall the purchaser defend himself? Can he defend at law, or must he resort to equity for protection? If the defendant had been the purchaser from the plaintiff, had he paid the full price of the land under the promise that the plaintiff would forthwith make him titles, if this promise had been made with a fraudulent intent on the part of the plaintiff to obtain the purchase-money and then assert his legal title, yet the defendant could not defend himself at law against the legal title, and would be compelled to resort to a court of equity for protection. If a court of law could not protect the defendant in the case supposed, I do not see how it could if the plaintiff having the legal title fraudulently induced the defendant to purchase at sheriff's sale under an execution against one who had no title that could be sold. The title to land can pass only by deed; and an estoppel at law, which works a divestiture of title, can be created in my opinion only by as high evidence. I have looked with some care into the English cases, but I have not found one in which a plaintiff at law was held to be bound by a parol estoppel when the subject-matter was such that the title could pass only by deed. If the title could pass by delivery or by parol, then a party shall be bound by a parol estoppel, and cannot be permitted after he has induced a party to act upon a supposed state of facts to show that these facts are untrue to the prejudice of him who has acted on his representations. Pickard *v.* Sears, 6 Ad. & E. 469; Heane *v.* Rogers, 9 Barn. & C. 577; Graves *v.* Key, 3 Barn. & Ald. 318. In the case of Hamlin *v.* Hamlin, 19 Maine, 141, it is said that "no verbal agreement respecting land can create an estoppel at law, for the title to land can pass only by deed, and no man can be barred of his right to land by way of estoppel unless by record or deed." In North Carolina the title to slaves can only pass by instrument in writing; and in the case of Knight *v.* Wall, 2 Dev. & B. 125, it was decided that title to slaves could not be made out at law by a parol estoppel; and if fraud had been practised on the party, he must seek redress in equity, but that such fraud could not at law convey to him the legal title. The cases of Bolling *v.* Petersburg, 3 Rand. 563, Heard *v.* Hall, 16 Pick. 460, Marshall *v.* Pierce, 12 N. H. 127, and Hamlin *v.* Hamlin, 19 Maine, 141, seem also to recognize the doctrine that the owner at law is not estopped from asserting his legal title to the land by a fraud committed by him on the defendant, and who in consequence of the fraudulent acts of the plaintiff has been induced to buy from one who had no title. I admit that cases may be found in the reports of some of the states of the Union that seem to countenance a contrary doctrine. But when we reflect that a court of law can look only to the legal title, and that the legal title to land cannot pass by parol in this state, it is difficult to perceive how a plaintiff at law shall be estopped from asserting his title merely because of his fraudulent acts or conduct, which render it inequitable or unjust for him to assert. If a court of law because of such conduct or acts should stop short and refuse to give effect to the legal title, would it not be on account of the

of the character of the grantee (the public) who was intended to be benefited by the act. It is worthy of doubt, however, even though the doctrine of the Alabama court be correct, whether this can be considered a sound distinction. It would seem better to say that the case of dedication is an admitted exception to the rule that land cannot be conveyed by parol. But it is considered that parol dedications depend upon the doctrine of estoppel in pais.[1]

There is, perhaps, little doubt of the correctness of the Alabama doctrine (except in those states in which equity is administered in courts of law) where the party claiming to hold the land by the equitable estoppel brings the common-law ejectment against the party who has been guilty of the fraud. The latter still holds the legal title to the land, and must prevail at law when it is exhibited against the equitable title. It is doubtful if an equitable estoppel can be ground of a common-law ejectment; though an estoppel by deed can be, for in the latter case the plaintiff has the legal title as between the parties. But it is difficult to see how an equitable estoppel could be more effectual than a purchase of and payment for the land, which without a deed would be no defence to an ejectment at law.

There is, however, the strongest authority in favor of the position that an equitable estoppel concerning land is available at law,[2] at least when it is not made the ground of a common-

equities of the defendant? Yet we know that a court of law will not look to or consider the equity of a party in opposition to the legal title of the other. The better course, in my opinion, is to pursue the well-settled rule of law, and to permit the legal title to prevail at law regardless of the equity the opposite party may have, and leave him to enforce his equitable rights in a Court of Chancery, which has power not only to arrest or enjoin the suit at law, but also to decree a conveyance of the legal title to him who in equity is entitled to it.' See also Warner *v.* Middlesex Assur. Co., 21 Conn. 444.

[1] Baker *v.* Johnston, 21 Mich. 319, 345; Lee *v.* Lake, 14 Mich. 12.

[2] Kirk *v.* Hamilton, 102 U. S. 68; Dickerson *v.* Colgrove, 100 U. S. 578; Brown *v.* Wheeler, 17 Conn. 345; Hatch *v.* Kimball, 16 Maine, 146; Durham *v.* Alden, 20 Maine, 228; Rangeley *v.* Spring, 21 Maine, 137; Copeland *v.* Copeland, 28 Maine, 525; Stevens *v.* McNamara, 36 Maine, 176; Bigelow *v.* Foss, 59 Maine, 162; McCune *v.* McMichael, 29 Ga. 312; Pool *v.* Lewis, 41 Ga. 162; Burkhalter *v.* Edwards, 16 Ga. 593; Davis *v.* Davis, 26 Cal. 23; McAfferty *v.* Conover, 7 Ohio St. 99; Spears *v.* Walker, 1 Head, 166; Barham *v.* Tuberville, 1 Swan, 437; Dodge *v.* Stacy, 39 Vt. 558; Halloran *v.* Whitcomb, 43 Vt. 306; Spiller *v.* Scribner, 36 Vt. 245; Smith *v.* Hall, 28 Vt. 364;

law ejectment. On a question of partition by parol agreement the Supreme Court of Connecticut, in Brown *v.* Wheeler, has said in reference to the position that a parol estoppel cannot prevail in the case of real estate: 'This certainly is not the common law. Littleton says: "And so a man can see one thing in this case, that a man shall be estopped by matter in fact though there be no writing by deed, indenture, or otherwise;" and Lord Coke, commenting thereon, gives as an instance of estoppel by matter in fact this very case of partition.[1] And such an award [one by parol] has in England been held sufficient to estop a party against whom ejectment was brought from setting up his title.'[2]

Concerning the first two of these authorities, however, it might be replied that they were before the Statute of Frauds; without which the reason for denying the right of the party resting on the estoppel would not be so strong. And in regard to the case of partition that is *record* evidence of the rights of the parties. However, apart perhaps from cases of ejectment at common law, the weight of authority is now clearly this way. Indeed, the ground upon which equity treats the case as out of the Statute of Frauds, to wit, the fraud of the person to be estopped, should be sufficient to justify a court of law in acting. The ground of an estoppel by conduct commonly is fraud; and it cannot be that a statute made to prevent the accomplishment of fraud should stand in the way of preventing such a result in any court. And it should be observed that it is not because of any difficulty involved in the redress itself that it has been supposed that equity alone has jurisdiction.

Proceedings at law which in equity might be barred by reason of estoppel may be enjoined if the estoppel from complication cannot be availed of at law.[3]

Shaw *v.* Beebe, 35 Vt. 205; Gove *v.* White, 23 Wis. 282; Mariner *v.* Milwaukee & St. Paul R. Co., 26 Wis. 84; Brown *v.* Bowen, 30 N. Y. 519; Finnegan *v.* Carraher, 47 N. Y. 493; Beaupland *v.* McKean, 28 Penn. St. 124; Stevens *v.* Dennett, 51 N. H. 324; Hale *v.* Skinner, 117 Mass. 474.

[1] Coke, Litt. 356.

[2] Doe d. Morris *v.* Rosser, 3 East, 15.

[3] Society for Manuf. *v.* Lehigh Valley R. Co., 32 N. J. Eq. 329; Williams *v.* Jersey, Craig & P. 91, 97. See Taylor *v.* Brown, 31 N. J. Eq. 163.

CHAPTER XXVI.

INCONSISTENT POSITIONS IN COURT.[1]

If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them.

It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party,[2] has taken a particular position deliberately in the course of a litigation must act consistently with it;[3] one cannot play fast and loose.[4] Thus, if counsel seeks to amend his pleadings and his request is granted upon a condition, and the amendment made accordingly, he cannot thereafter object to the condition; supposing at all events that it was competent to him to accept it.[5] So after agreeing that a person shall be treated as a party from a time specified the agreeing party cannot afterwards say that such person was not a party from the time stated.[6] Upon the same principle one cannot waive a tort and sue for it in the

[1] The remark made ante, p. 673, note 1, is equally applicable to the subject of this chapter.

[2] Lyon v. Travelers' Ins. Co., 55 Mich. 141.

[3] Railway Co. v. McCarthy, 96 U. S. 258; Daniel v. Morton, 16 Q. B. 198; Dreyfous v. Adams, 48 Cal. 131; Garber v. Doersom, 117 Penn. St. 162, 168; Bonham v. Bishop, 23 S. Car. 96; Dunning v. West, 66 Ill. 366; Cronk v. Trumble, ib. 428; Long v. Fox, 100 Ill. 43; Thurlough v. Kendall, 62 Maine, 166; Brown v. Bowen, 90 Mo. 184; Callaway v. Johnson, 51 Mo. 33; McQueen v. Gamble, 33 Mich. 344; Savage v. Russell, 84 Ala. 103; Elliott v. Dycke, 79 Ala. 150; Nitche v. Earle, 117 Ind. 270; Bradley v. Rogers, 33 Kans. 120.

[4] Garber v. Doersom, supra.

[5] Smith v. Rathbun, 75 N. Y. 122.

[6] Lawrence v. Ballou, 50 Cal. 258.

same action.[1] So also after judgment for the plaintiff in ejectment the plaintiff cannot maintain an action ex contractu for mesne profits, even though the defendant is a co-tenant with him, for the defendant has been treated as and found to be a trespasser.[2] And one who insists in ejectment upon recovery of a building upon the land as part thereof will not be allowed to deny that it is a fixture and a permanent improvement, so as to escape payment to the defendant of the value thereof, to which the defendant is entitled.[3] Asking for a continuance of a cause is held to be an affirmance conclusive of the court's jurisdiction.[4] And participating in a new trial precludes one from complaining of errors in the first;[5] especially will one be precluded from complaining of an error committed at one's own request.[6]

Again, if provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or to be taken upon the footing of the waiver.[7] If a party accept the benefit of a judgment, some authorities hold that he will be estopped to appeal from it,[8] to dispute the court's jurisdiction,[9] or otherwise to deny its validity and force.[10]

[1] Finlay *v.* Bryson, 84 Mo. 664, 671; Brewer *v.* Sparrow, 7 Hurl. & C. 310; Rodermund *v.* Clark, 46 N. Y. 354; Brown *v.* Moran, 42 Maine, 44; Whitney *v.* Allaire, 4 Denio, 554.

[2] Munroe *v.* Luke, 1 Met. 459. 'Allegans contraria non est audiendus;' that is, as Lord Kenyon is said to have translated it, a man shall not 'blow hot and cold at the same time.' Kaehler *v.* Dobberpuhl, 60 Wis. 256, 261.

[3] Zwietusch *v.* Walkins, 61 Wis. 615. See Dalton *v.* Whittem, 3 Q. B. 961; ante, p. 687.

[4] Sargent *v.* Flaid, 90 Ind. 501. So, of course, of appearance and submitting, without objection, to jurisdiction. King *v.* Penn, 43 Ohio St. 57; Cincinnati R. Co. *v.* Mara, 26 Ohio St. 190; Bowen *v.* Bowen, 36 Ohio St. 315. So of an admission of facts, upon which jurisdiction is exercised. Railway Co. *v.* Ramsey, 22 Wall. 322, 327; Thornton *v.* Baker, 15 R. I. 553, 555.

[5] Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 277.

[6] Price *v.* Breckenridge, 92 Mo. 378; Fairbanks *v.* Long, 91 Mo. 628, 633. See Mohr *v.* Marks, 39 La. An. 575.

[7] Bates *v.* Ball, 72 Ill. 108.

[8] Carll *v.* Oakley, 97 N. Y. 633; Bennett *v.* Van Syckel, 18 N. Y. 481; Radway *v.* Graham, 4 Abb. Pr. 448. But see Embrey *v.* Palmer, 107 U. S. 8; Morriss *v.* Garland, 78 Va. 215; holding that to accept satisfaction of a decree, without agreeing not to appeal, is no waiver of errors so as to estop an appeal.

[9] Ellis *v.* White, 61 Iowa, 644.

[10] Test *v.* Larsh, 76 Ind. 452, 460; Kile *v.* Yellowhead, 80 Ill. 208; Sherman *v.* McKeon, 36 N. Y. 266. 'It is not inconsistent for one appellant to demand that he be not harassed by many actions, and yet press his appeal [from one of them]. In beating off one action wrongfully prosecuted the right

On the other hand, if a party decline to accept a judgment or decree in his favor and seek another, he will not be permitted to claim the first, on the second one turning out less favorable to him.[1] Nor can a plaintiff take a position in court inconsistent with the nature of his suit or claim.[2] Thus, in regard to goods levied upon, one cannot claim them first as owner, and then after sale claim a lien upon them. The first claim is adverse to the levy; the second seeks the benefit of it.[3] Nor after recovering judgment in one character or capacity can the party turn round and say that that character or capacity was not the true one under which he should have acted.[4] Nor can either party act inconsistently with the material allegations of his own pleadings.[5] It is of course otherwise of immaterial allegations, as of the particular age of an infant in ordinary cases.[6] So after a pleading has by leave of court been withdrawn the pleader is at liberty to plead facts inconsistent with those before alleged.[7] And after judgment against a party, he may allege any fact consistent therewith against the opposite party, though his present allegation be inconsistent with what he alleged in the first suit.[8]

Admissions of fact, deliberately made in open court, with full knowledge, are also binding until withdrawn by leave.[9] Thus,

secured by the appeal, that of questioning the judgment appealed from, is not surrendered. There is no inconsistency because there is no affirmation of the validity of the judgment in the one position and a denial in the other.' Pittsburgh Ry. Co. *v.* Swinney, 91 Ind. 399, 403.

[1] Glover *v.* Benjamin, 73 Ill. 42.

[2] Daniel *v.* Morton, 16 Q. B. 198; Bradley *v.* Coolbaugh, 91 Ill. 148; Tibbets *v.* Shapleigh, 60 N. H. 487, 491.

[3] Edwards's Appeal, 105 Penn. St. 103. See Hewett *v.* Currier, 63 Wis. 386; Garrity *v.* Thompson, 64 Texas, 597; Adoue *v.* Seeligson, 54 Texas, 593; ante, p. 567.

[4] Pittsburgh Ry. Co. *v.* Swinney, 91 Ind. 399, 405.

[5] Greenville R. Co. *v.* Joyce, 8 Rich. 117; Lehman *v.* Clark, 85 Ala. 109; Ramsey *v.* Henderson, 91 Mo. 560.

[6] See Morgan *v.* Vaughan, T. Raym. 456.

[7] Wheelock *v.* Lee, 74 N. Y. 495, explaining Ogdensburgh R. Co. *v.* Vermont R. Co., 63 N. Y. 176.

[8] McQueen's Appeal, 104 Penn. St. 595.

[9] Cheney *v.* Selman, 71 Ga. 384; Clark *v.* Clark, 70 Ga. 362; Smith *v.* Fowler, 12 Lea, 163, 171; Stribling *v.* Prettyman, 57 Ill. 371; Hull *v.* Johnston, 90 Ill. 604; People *v.* Stockton R. Co., 49 Cal. 414; Hyatt *v.* Burlington Ry. Co., 68 Iowa, 662; Boubede *v.* Aymes, 29 La. An. 274; Compton *v.* Sandford, 30 La. An. 838; Jones *v.* Congregation of Mt. Zion, ib. 711. See Mott *v.* Consumers' Ice Co., 73 N. Y. 543, and ante, p. 571, note, in regard to

an agent's authority cannot be admitted and disputed by the principal in the same trial.[1] Nor, generally speaking, will one who procures a special decree be permitted to allege that there are mistakes in it;[2] though this must not be taken too broadly. An admission in pleading of the legal sense and effect of a writing is not enough to estop the pleader upon the matter as a question of fact.[3] But assent to a particular proceeding in court, if given with knowledge of the facts, is conclusive.[4] Concessions too upon which rulings to a jury are given are conclusive.[5] So of recitals in judgment entries of material facts admitted or consented to.[6]

And if a plaintiff offer *competent* evidence to prove a fact and the court reject it on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts embraced in the offer of evidence.[7] So if a party has upon notice refused or without excuse failed to produce a writing in his possession, and the notifying party has thereupon given secondary evidence of its contents, the party notified will be estopped in the absence of fraud to produce it in evidence.[8] And where a party has been notified under rules of court that he may inspect a particular document which he will be required to admit in evidence as e. g. a 'counterpart of lease,' if he fail to inspect it he will not be permitted on the production of a document indorsed 'counterpart' to say it is not the lease.[9]

the extent of the estoppel. A witness's statements are not conclusively admitted by not being contradicted. McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65. Nor is a person estopped to deny admissions made by him on the trial as witness. Wilkinson *v.* Wilson, 71 Ga. 497. Contra, in Louisiana. Folger *v.* Palmer, 35 La. An. 743. See ante, pp. 114, note 1, and 571, note 2.

[1] People *v.* Stockton R. Co., 49 Cal. 414.

[2] Wood *v.* Rawlings, 76 Ill. 206.

[3] Thayer *v.* Arnold, 32 Mich. 336. On the other hand, one who has sworn that property levied upon is another's cannot assert that it is not that person's on the ground that the levy did not describe it as his. Scolly *v.* Butler, 59 Ga. 849.

[4] First National Bank *v.* Warrington, 40 Iowa, 528.

[5] Marquette R. Co. *v.* Marcott, 41 Mich. 433.

[6] Kemp *v.* Lyon, 76 Ala. 212.

[7] Thompson *v.* McKay, 41 Cal. 221.

[8] Doe d. Thompson *v.* Hodgson, 12 Ad. & E. 135.

[9] Doe d. Wright *v.* Smith, 8 Ad. & E. 255. Whether it is too late to correct at the trial a statement made to the opposite party before suit, concerning the cause of action, which might have been corrected before, see Connecticut

This estoppel prevails as well of plain inferences from the facts in hand as of the facts themselves. Thus, to ask for a nonsuit or to rest a defence upon a proposition of law without asking to go to a jury estops the party on appeal to say that there were questions of fact in the case for a jury.[1] So pleading a levy by writ on property as a defence to an action of replevin estops the party to say that he had no possession.[2] Indeed, the estoppel appears to prevail also in regard to inferences of law that follow regularly from the position taken. Thus, it is held in Georgia that when counsel demands the right of closing and the demand is granted, he thereby becomes estopped to say that the burden of proof is not upon him.[3] So if a dismissal is entered in favor of one of several defendants sued upon a joint contract, the plaintiff will be barred from proceeding against the others.[4] And if one intervene in the cause of another, or bring suit before a particular court, he cannot at will deny the jurisdiction of the court he has sought;[5] though he may of course withdraw his claim on paying costs.

Again, the party who has committed a fault in pleading which has not been noticed by the other side cannot object that the other side has followed the error.[6] In the case cited the defendant to an action by an indorsee against him as acceptor of two bills of exchange pleaded that the bills had been accepted for the accommodation of the drawer; that after they were due the drawer gave the plaintiff other bills of larger amount, for which the plaintiff agreed to give him time on the bills now sued upon; that new bills were given in payment of the bills now sued upon; and that the transaction was unknown to the defendant. To this the plaintiff replied de injuria. The defendant now demurred on the ground that the replication attempted to put in issue two matters of defence; but the demurrer was overruled.[7]

Ins. Co. *v.* Schwenk, 94 U. S. 593, distinguishing Campbell *v.* Charter Oak Ins. Co., 10 Allen, 213, and Irving *v.* Excelsior Ins. Co., 1 Bosw. 500.

[1] Ormes *v.* Dauchy, 82 N. Y. 443; East Hampton *v.* Kirk, 68 N. Y. 459, 464.

[2] Godfrey *v.* Brown, 86 Ill. 454.

[3] Smith *v.* Haire, 58 Ga. 446.

[4] Boyle *v.* Webster, 17 Q. B. 950; ante, p. 104.

[5] Jack *v.* D. & M. R. Co., 49 Iowa, 627; Buckley *v.* Stevens, 29 Ohio St. 620. See Fahnestock *v.* Gilham, 77 Ill. 637; Kennedy *v.* Redwine, 59 Ga. 327.

[6] Reynolds *v.* Blackburn, 7 Ad. & E. 161.

[7] In the course of the argument Pat-

The principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment in the first.[1] It is laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth.[2] Thus, in Hooker *v.* Hubbard the defendant pleaded to a suit upon a promissory note that he had given another in payment and renewal of it, and had judgment accordingly. He was now sued upon the renewal note, and attempted to set up the defence that the second note was given upon a condition which had never been fulfilled, but the court held him estopped. It was declared by the court that if the second note had been delivered upon a condition, then by pleading it as payment of the first, upon which he was liable, he had waived the right to take the benefit of the non-performance of the condition and ratified the absolute delivery of the present note. 'It could not have been effectual as a payment, unless it were a valid and binding instrument.'

It will be seen from these cases that the rule requiring consistency of action before the courts is no arbitrary rule, but one demanded, as was suggested at the opening of this chapter, by the very object of courts of justice. Where, then, no wrong would be done to the court or to other parties to a cause by

teson, J. said to counsel for the defendant: 'You attempt to set up a plea which you allege to be bad, because, as you contend, the plaintiff has made a bad replication. If your plea is double, and there is a general replication, you cannot take advantage of the fault of your plea to make the replication bad.'

[1] A surety in a replevin bond, having by his execution thereof in the replevin proceedings enabled the plaintiff to obtain possession of the property in controversy, will be estopped to controvert the jurisdiction of the court over the persons of the parties. Harbaugh *v.* Albertson, 102 Ind. 69.

[2] Hill *v.* Huckabee, 70 Ala. 183, 188; Caldwell *v.* Smith, 77 Ala. 157, 165; Jones *v.* McPhillips, 82 Ala. 102, 116; Lehman *v.* Clark, 85 Ala. 109, 113; Clay *v.* Buchanan, 69 Iowa, 88; Hooker *v.* Hubbard, 102 Mass. 239; Philadelphia R. Co. *v.* Howard, 13 How. 307; Ogden *v.* Rowley, 15 Ind. 56; Pendleton *v.* Dalton, 92 N. Car. 185 (resisting enforcement of a contract successfully as within the Statute of Frauds estops the party to rely upon it in a suit for money paid thereon); Perkins *v.* Jones, 62 Iowa, 345. If one refuse to surrender possession of land on ground of want of right in him demanding, who thereupon brings suit for it, the party refusing cannot now deny his possession. Kirkland *v.* Trott, 66 Ala. 417. See also Walker *v.* Walker, 37 La. An. 107.

permitting a change of position, a change should in principle and will in fact be allowed.[1] Thus, where a party has given notice of appeal by mistake to a particular court, when the appeal should have been made to another court, and has discovered his mistake before any step has been taken by others in consequence, he may at *will* correct himself;[2] but only (at will) upon the footing that no prejudice is done to others.[3]

[1] Quoted with approval in Green Bay Canal Co. *v.* Hewitt, 62 Wis. 316, 327, and in Pittsburgh Ry. Co. *v.* Swinney, 91 Ind. 399, 404.

[2] Regina *v.* Liverpool, 15 Q. B. 1070; Regina *v.* Buckinghamshire, 4 El. & B. 260.

[3] Regina *v.* Salop, 4 El. & B. 257. Where a special finding of an immaterial fact has been made upon an erroneous instruction, the party may still have the benefit of other and material findings, which ought to have resulted in judgment for him. Detroit Ry. Co. *v.* Hayt, 55 Mich. 347.

CHAPTER XXVII.

PRECEDENTS IN PLEADING.

We present in conclusion the following common-law precedents in pleading by way of estoppel. Some of the forms are taken from Chitty's Precedents in Pleading; some are from Story's Pleadings; some are from Bullen and Leake's Precedents; and others are from the pleadings in the reported cases.

§ 1. *Commencement and Conclusion of a Plea of Matter of Estoppel.*[1]

The defendant by ——, his attorney [or in person], says that the plaintiff ought not to be admitted to say [stating the matter to which the estoppel relates], because he says [state the matter of estoppel and conclude]. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to be admitted against his own acknowledgment by his deed aforesaid [or otherwise, according to the estoppel] to say [stating the matter to which the estoppel relates, as before].

§ 2. *Replication by Way of Estoppel to a Plea.*[2]

That the defendant ought not to be admitted to plead the said plea by him above pleaded, because he says [state the matter of estoppel]. And this the plaintiff is ready to verify; wherefore he prays judgment if the defendant ought to be admitted, contrary to his own acknowledgment and deed [or otherwise], to plead that [here state the matter to which the estoppel relates].

[1] Chitty, 408, 3d Eng. ed.

[2] Chitty, 408, 3d Eng. ed.

§ 3. *Plea by Matter of Estoppel that the Plaintiff brought an Action against the Defendant for the same Cause of Action, and that the Defendant had Judgment.*[1] *Replications, etc.*

[Commencement, § 1, supra.] That the plaintiff before this suit brought an action against the defendant in the Court of ——, for the said debt [or cause of action] in the declaration mentioned, and thereupon such proceedings were had that afterwards, and before [or after[2]] this suit, it was considered by the judgment of the said court that the plaintiff should take nothing by his writ in respect of the said debt [or cause of action], as by the record of the said court fully appears, and which said judgment is still in full force. [Conclude as supra.]

Another form:[3] And the said D comes and defends, etc., when, etc., and says that the plaintiff (actio non), because he says that formerly, to wit, at a court of Common Pleas, holden at, etc., within and for the county of, etc., on, etc., the said plaintiff impleaded the said D in a certain plea of trespass on the case on promises, to the damage of the said plaintiff $100 on occasion of not performing the very same identical promises in the said declaration mentioned. And such proceedings were therefore had, that afterwards,[4] to wit, at a term of the court holden at, etc., within and for, etc., on, etc., the said plaintiff by the consideration of the same court, recovered against the said D in that plea $50 for his damages, which he had sustained by reason of the not performing the very same identical promises in said declaration mentioned, together with $10, costs of suit, whereof the said D was convicted, as by the record thereof now

[1] 1 Chitty, Pl. 408, 3d Eng. ed. For forms see Palmer *v.* Temple, 9 Ad. & E. 508; Overton *v.* Harvey, 9 C. B. 324; Eastmure *v.* Laws, 5 Bing. N. C. 444; Gordon *v.* Whitehouse, 18 C. B. 747.

[2] It is held to be immaterial whether the former judgment were rendered before or after the present action. Casebeer *v.* Mowry, 55 Penn. 419; Duffy *v.* Lytle, 5 Watts, 120; Child *v.* Eureka Powder Works, 45 N. H. 547.

[3] Story's Pleadings, 185, Oliver's ed.

[4] If the action be carried to the Supreme Court this form is sufficient; and the defendant may say, 'And that such were the proceedings thereupon that afterwards at the Supreme Court, begun and holden at, etc., within and for, etc., on, etc., the said plaintiff recovered judgment against the said D, for, etc.' It is not necessary that the particular proceedings should be stated.

remaining in the same court more fully appears; which said judgment still remains in full force and unreversed. And this the said D is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against him, etc.

Former judgment on appeal to Supreme Court, with continuance. [As last above as far as 'whereof the said D was convicted.'] From which said judgment the said D appealed to the Supreme Court then next to be holden at, etc., within and for the same county,[1] on, etc.; and afterwards, to wit, at the said Supreme Court holden at, etc., on, etc., the said D entered his said appeal. And such were the proceedings thereupon had that afterwards, to wit, at a term of the said Supreme Court holden at, etc., on, etc., the said plaintiff by the consideration of the same court recovered judgment, etc., as appears by the records thereof in the same court remaining; which said judgment remains in full force and unreversed. And this the said D is ready to verify. Wherefore, etc.

Former judgment and appeal, and appeal not entered, and judgment affirmed. [As above.] From which said judgment the said D appealed to the Supreme Court then next to be holden at, etc., on, etc.; and afterwards, to wit, at said Supreme Court holden at, etc., on, etc., the said D did not prosecute his said appeal; whereupon in the same term, on the complaint of said plaintiff, by the consideration of the same court, the said former judgment was affirmed with additional damages and costs. And thereupon it was considered by the same court that the said plaintiff recover against the said D $50 damages and $10 costs of suit, as appears by the records thereof in the same court remaining; which said judgment remains in full force and unreversed. And all this the said D is ready to verify. Wherefore, etc.

Replication of nul tiel record. And the plaintiff says that, notwithstanding anything by the said D above in pleading alleged, he, the plaintiff, ought not to be barred from having his said action thereof maintained against said D, because the plain-

[1] This of course to be omitted where the Supreme Court has but one place for holding session.

tiff says that there is not any such record of the judgment aforesaid recovered by him, the plaintiff, against the said D in the said Court of Common Pleas held, etc., as the said D hath above in pleading alleged. And this the plaintiff is ready to verify.[1] Wherefore he prays judgment and his damages by reason of the promises to be adjudged to him, etc.

Rejoinder. And the said D says that there is such a record of the judgment aforesaid, recovered by the plaintiff against him, the said D, remaining in the Court of Common Pleas within and for the county of, etc., as he, the said D, hath above in pleading alleged; and this he is ready to verify by the said record, etc.

Replication, with new assignment of other promises. And the plaintiff says (precludi non), because he says that although true it is that he, the plaintiff, at a court of, etc., held at, etc., on, etc., within and for the county of, etc., did implead the said D, in the said court, in a certain plea of trespass on the case in promises, for the not performing certain promises; and that such proceedings were thereupon had in that plea in the same court that afterwards, to wit, at a court, etc., held, etc., on, etc., he, the plaintiff, recovered against the said D by the judgment and consideration of the same court $500, in and by the said court adjudged to him for his damages, which he had sustained as well by the reason of not performing the said promises, as for his costs and charges by him about his suit in that behalf expended; whereof the said D was convicted, as by the record and proceedings thereof in the same court remaining fully appears; and that the said judgment remains in full force and effect, not reversed, annulled, defeated, or avoided. Yet for replication in this behalf the plaintiff says that the said several promises for which the plaintiff impleaded the said D and recovered damages, as in the said record mentioned, were not, nor are any or either of them, the same identical promises as in the said eight counts of the said declaration of the plaintiff above are mentioned, but are other and different promises than in the said eight counts of the said declaration mentioned, and whereof the plaintiff has now

[1] If the plaintiff does not wish the the record aforesaid,' and omit the defendant to rejoin, he may add, 'by prayer of judgment.

impleaded the said D in that behalf, and above in his said declaration in that behalf complained against him; for that the plaintiff has now impleaded him for that, whereas, in the lifetime of the said A, they, the said A and the said D, were indebted to the plaintiff in the sum of $1,000, other and different than the sum in the said record mentioned, for other and different work and labor, etc., than in the said record mentioned, of the plaintiff before that time done, performed, and bestowed by the said plaintiff for the said D and the said A on their retainer and at their special request; and for other and different money paid, laid out, and expended than the money in said record mentioned by the plaintiff, at the like special request of the said A and the said D, etc.; and that, being so indebted, they, the said A and the said D, in the lifetime of said A, afterwards, to wit, on, etc., at, etc., in consideration thereof, etc. [in common form, and so insert the other counts in the declaration, stating them to be for other and different demands]; and which said last-mentioned promises so mentioned and set forth in the said eight counts of the said now declaration of the plaintiff, and for the non-performance whereof the plaintiff has above in his said declaration complained against the said D, are other and different promises than those for which the plaintiff recovered damages as in the said record, and in the plea of the said D above secondly pleaded in bar are mentioned; and this, etc. Wherefore, inasmuch as the said D has not answered the said complaint of the plaintiff as to the breach and non-performance of the said promises in the said first eight counts of the said declaration mentioned, and so newly above assigned, he, the said plaintiff, prays judgment and his damages, etc., to be adjudged to him.

Rejoinder. And the said D, as to the said plea of the plaintiff by him first above pleaded by way of new assignment, and in reply to the said plea of the said D secondly above pleaded in bar, says that he did not promise in manner and form, as the plaintiff has above in his said new assignment complained against him; and of this he puts himself upon the country.

Former recovery in an action by executor against lessee. And the said D comes, etc., when, etc., and says that the said plaintiff,

assignee as aforesaid (actio non), because he says that after the making of the said articles of agreement in the said declaration mentioned, and after the said breach of covenant therein complained of, and in the lifetime of the said A in the said agreement and declaration mentioned, and before [or after[1]] the commencement of the action of the said plaintiff as assignee as aforesaid, to wit, at a court, etc., held, etc., on, etc., he, the said A, impleaded the said D of and for the same identical breach of covenant in the said declaration above mentioned and there complained of; and such proceedings were thereupon had in the same court, before the same judges, that afterwards in the lifetime of the said A, to wit, at the same court, he, the said A, by the consideration and judgment of the same court, recovered against the said D $1,000, as well for damages which he had sustained as well by reason of the very same identical breach of covenant in the said declaration mentioned and therein complained of, as for his costs and charges by him in his suit in that behalf expended; whereof the said D is convicted as by the said record and proceedings thereof, which remain in the same court in full force and effect, may fully appear; and this, etc. Wherefore, etc.

§ 4. *Plea of Estoppel by Verdict of a particular Matter adjudicated.*[2]

In the well-known case of Outram *v.* Morewood[3] the plaintiff brought an action of trespass against the defendants, Morewood and wife, for digging and getting out coals from a coal mine, alleged by the plaintiff to be within and under his close, called the Cow Close. The defendants pleaded and showed title regularly brought down to them, in right of the wife, from one Sir John Zouch, who in the 39th Elizabeth was seised in fee of the manor of Alfreton, and of certain messuages and lands within

[1] Casebeer *v.* Mowry, 55 Penn. St. 419; and cases supra, p. 725, note 2.

[2] See ante, pp. 90 et seq. Without judgment a special finding does not work an estoppel. Hawkes *v.* Truesdell, 99 Mass. 557; Burlen *v.* Shannon, ib. 200; Lea *v.* Lea, ib. 493; Thurston *v.* Thurston, ib. 39; Hubert *v.* Fera, ib. 198; Wadsworth *v.* Connell, 104 Ill. 369, 374; ante, p. 51.

[3] 3 East, 346.

the manor, under which title they claimed all the coals under those lands except such as were embraced under a certain description. And the defendants averred that the coals in question were under the lands of the said Zouch, and were not under any of the premises mentioned in the exception.

The replication to this plea was the important part of the pleadings, and we present it at length. It was sustained upon thorough consideration by Lord Ellenborough. It stated that the defendants ought not to be admitted in their plea to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the making the indenture of bargain and sale in the said plea mentioned, was part and parcel of the said coal mines, veins, and delphs of coals by the said indenture bargained and sold as aforesaid; because heretofore, in Easter term, 32 Geo. 3, the plaintiff impleaded the defendant Ellen, then Ellen Morewood, widow, in a certain plea of trespass, and therein declared against her for that the said Ellen, on the 5th of May, 1792, with force and arms broke and entered a certain coal mine or vein of coals of the plaintiff, situate and being within and under a certain part of a certain close of the plaintiff, called Cow Close, or the Great Cow Pasture, in the parish of Alfreton, in the said county of Derby, and dug out of the said coal mine or vein of coals of the plaintiff large quantities of coals, etc., and took and carried away the same, etc.; and that in Trinity term, 32 Geo. 3, the defendant Ellen defended the force, etc.; and as to breaking and entering the said coal mines, etc., under the Cow Close, etc., pleaded that the plaintiff ought not to maintain his said action against her, because the said John Zouch, on the 2d of November, 38 Eliz., was seised in fee of and in the said manor of Alfreton, and divers messuages, lands, and tenements in the parish of Alfreton aforesaid, in the said county, with the appurtenances. And the said Ellen, in and by her said plea in the said former suit, after further setting forth (amongst other things) the said indenture of bargain and sale in the said plea mentioned, in manner and form as the same indenture is in that plea set forth, averred that the said coal mine or vein of coals in the declaration hereinbefore mentioned, at the time of the making of the said indenture of bargain and sale,

was part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold as aforesaid. And the said Ellen, in and by her said plea in the said former suit, claimed to be entitled to the said coal mine or vein of coals, in the said hereinbefore-recited declaration mentioned, by the same means, and in manner and form, as the said defendants have above in their said plea in this suit alleged; and that she, the said Ellen, was ready to verify: wherefore she prayed judgment, etc. And the said plaintiff, as to the said plea of the said Ellen in the said former suit, said that he ought not to be barred, etc.; because, protesting that the said Sir John Zouch was not seised in fee of and in the said close in the said hereinbefore-recited declaration mentioned, or of or in the coals, veins, mines, and delphs of coals in or under the same, or any part thereof, as by the said last-mentioned plea was above supposed, he, the said plaintiff, said that the said Ellen, at the said several times when, etc., of her own wrong, broke and entered the said coal mine, etc., within and under the said part of the said close of the plaintiff, called the Cow Close, etc., in the hereinbefore-recited declaration mentioned, and dug out of the said coal mines, etc., large quantities of coals, and took and carried away the same, etc., in manner and form as the plaintiff had above complained against her; without this, that the said coal mine or vein of coals in the said first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in that plea first mentioned, was part and parcel of the said coal mines, veins, and delphs of coal by the said indenture bargained and sold as aforesaid, in manner as the said Ellen had in the said plea above alleged; and this he was ready to verify: wherefore the plaintiff prayed judgment, etc. And the said Ellen, as before, said that the said coal mine or vein of coal in the said first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in her said plea first mentioned, was part and parcel of the said coal mines, veins, and delphs of coal, by the said indenture bargained and sold as aforesaid, in manner and form as the said Ellen had in the said plea alleged; and of that she put herself upon the

country, and the said Joseph did so likewise. And such further proceedings were thereupon had that afterwards, at the assizes at Derby on Saturday the 16th of March, in the 33 Geo. 3, the said issue, so joined, etc., was tried by a jury of the county, etc.; and as to the same issue, the jurors of that jury upon their oath said that the coal mine or vein of coals, in the first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the indenture of bargain and sale first mentioned in the plea of the said Ellen, in the said former suit, were not part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold, in manner and form as the said Ellen had in that behalf in pleading alleged; and they assessed the plaintiff his damages, etc. That such further proceedings were thereupon had that the plaintiff in Trinity term, 33 Geo. 3, recovered judgment, etc., which judgment is still in force, etc. The replication then averred that the plaintiff and Ellen, the defendant named in that record, are the same parties as in this suit, and that the said coal mine or vein of coals in that record mentioned, and the said coal mine or vein of coals in the pleadings in this suit mentioned, are one and the same; wherefore the plaintiff prayed judgment if the defendants ought to be admitted, against the said record, to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel of the said coal mine, veins, and delphs of coals, by the said indenture bargained and sold as aforesaid.

§ 5. *Replication by Way of Estoppel to a Plea of Set-off, of a Judgment in an inferior Court upon the same Matter.*

The plaintiff, as to the defendant's —— plea, says that the defendant ought not to be admitted to plead the said plea, because he says that the now defendant, in the county court of ——, holden at ——, then being a court duly constituted and holden under the statutes relating to the county courts, and then having jurisdiction to hear and determine the plaint hereinafter mentioned, levied a plaint against the now plaintiff for the recovery of the same debt which the defendant now seeks to set off

against the now plaintiff's claim, to which that plea is pleaded; and such proceedings were thereupon had in the said court, in the matter of the said plaint, that afterwards it was considered and adjudged by the said court, in the matter of the said plaint, that the now plaintiff did not owe to the now defendant the said debt or any part thereof, and that the now defendant should take nothing by his said plaint in that behalf, and the said judgment still remains in force: wherefore he prays judgment if the defendant ought to be admitted, etc.[1]

§ 6. *Replication to a Plea traversing the Plaintiff's Title to Land, — an Estoppel by a Judgment in Ejectment.*

[Commence as in § 5, supra.] That on the day and year last aforesaid, the plaintiff, for the purpose of recovering possession of the said land, sued out of the Court of —— a writ of ejectment, directed to the defendant by name, being the person then in possession of the said land, and to all persons entitled to defend the possession of the said land, to the possession whereof the plaintiff by the said writ claimed to be then entitled and to eject all other persons therefrom, commanding the said defendant and the said persons entitled to defend the possession of the said land, or such of them as denied the alleged title of the plaintiff, within sixteen days after service of the said writ to appear in the said Court of —— to defend the said property, or such part thereof as they might be advised, in default whereof judgment might be signed and they turned out of possession. And such proceedings were thereupon had in the said court, upon the said writ, that by the judgment of the said court it was considered that the plaintiff should recover the possession of the said land; and afterwards, and by virtue of the said judgment, the plaintiff entered into possession of the said land: wherefore the plaintiff prays judgment whether the defendant ought to be admitted, etc.[2]

[1] For similar *plea* in estoppel see Eastmure *v.* Laws, 5 Bing. N. C. 444.

[2] For similar replications see Doe *v.* Wellsman, 2 Ex. 368; Wilkinson *v.* Kirby, 15 C. B. 430, 433.

§ 7. *Plea of Judgment recovered by the Plaintiff in a superior Court for the same Debt or Cause of Action.*

And the said defendant, by, etc., comes and defends, etc., and says that the said plaintiff ought not to have or maintain his aforesaid action, etc., because he says that the plaintiff heretofore, in the Court of ——, at ——, sued the defendant in an action for the same debt [or cause of action] as in the declaration alleged, and such proceedings were thereupon had in that action that the plaintiff afterwards, by the judgment of the said court, recovered against the defendant $—— for the said debt [or cause of action], and his costs of suit in that behalf; and the said judgment still remains in force, and this the defendant is ready to verify, etc.: wherefore the defendant prays judgment whether the plaintiff ought to have or maintain his action, etc.

If the judgment was rendered in an inferior court, conform the plea in this respect to § 5, supra.

The following precedent for a similar plea is given by Chitty, and is perhaps preferable to the one above given.[1] [Commencement as supra.] That the said plaintiff heretofore, to wit, in —— term, A. D. ——, in the Court of ——, at ——, before ——, impleaded the said defendant in a certain plea of trespass on the case on promises to the damage of the said plaintiff of $——, for the not performing the very same identical promises and undertakings, and each and every of them in the said declaration mentioned; and such proceedings were thereupon had in the said court in that plea, that afterwards, to wit, in the —— term, the said plaintiff, by the consideration and judgment of the said court, recovered in the said plea against the said defendant $—— for the damages which he had sustained, as well on occasion of the not performing the same identical promises and undertakings in the said declaration mentioned, as for the costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; as by the record and proceedings thereof, still remaining in the said court at

[1] 3 Chitty, Pleading, 929.

—— aforesaid, more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this, etc. [Conclude as supra.]

§ 8. *Pleas in Debt and Scire Facias on Judgments.*

By executor. Nul tiel record; and joint judgment, one of defendants being still alive.[1] And the said D comes and defends the force and injury when, etc., and says that the plaintiff (actio non), because he says that there is no such record of the recovery aforesaid in the said court now here remaining, as the said plaintiff by his declaration aforesaid has above supposed. And this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his said action against him, the said D, etc.

And the said D, with leave of the court here, further defends the force and injury when, etc., and says that the plaintiff (actio non) because he saith that the judgment aforesaid in the said declaration of the said plaintiff mentioned, to be had and recovered against the said A in his lifetime, was also had and recovered as well against a certain B as against the said A in his lifetime, as appears by the aforesaid record thereof in the court here now remaining. And the said D says that the said A died on, etc., at, etc., and the aforesaid B survived the said A, to wit, at, etc. And this he, the said D, is ready to verify. Wherefore, etc.

§ 9. *Plea of Judgment for Defendant pro eadem Causa rendered in a foreign Court.*

The following plea to indebitatus assumpsit was pleaded in Plummer *v.* Woodburne;[2] it was adjudged bad for the omission to state that the judgment rendered in the foreign court was final and conclusive there. We have supplied the omission.

As to the first, second, fourth, sixth, and eighth counts, the

[1] Story's Pleadings, 338, Oliver's ed. See ibid. pp. 518, 519, as to like forms in scire facias on judgments.

[2] 4 Barn. & C. 625.

defendant says that the plaintiff ought not to be admitted to say that the defendant undertook and promised as in those counts or any of them mentioned; because the plaintiff and his three late copartners, on the 27th of February, 1817, in a certain court of judicature of our sovereign lord, the King, holden in parts beyond the seas, in and for the island of St. Christopher, to wit, a certain court of record, called the Court of King's Bench and Common Pleas, before John Garrett, Chief Justice, etc., at, etc., impleaded the said defendant in a certain plea of trespass on the case upon promises, and in that suit declared against the defendant, amongst other things, for that whereas [the plea here set out the declaration in the former action verbatim, which appeared to be for the same causes of action mentioned in the first, second, fourth, fifth, sixth, and eighth counts of the declaration in the present suit]; that to such former declaration the defendant pleaded non assumpsit, upon which issue was joined. And such further proceedings were thereupon had in the said former suit, that afterwards, to wit, at, etc., the said issue joined was tried by a jury of twelve men, and as to that issue the jurors of that jury upon their oath did say, that they found for the defendant with one penny costs. The plea then stated that judgment was given for the defendant upon and agreeably to the said verdict, and that that judgment was affirmed by a court of error in the island, and by the King in council, adding: Which said judgments are still in full force, as by the record, etc. Averment that the said proceedings, so had in the courts of the said island and in the said Court of Privy Council, were at the times when they were so had within the jurisdiction of the same courts respectively, and were carried on in conformity with and according to the due course of law at those times established in force in the island aforesaid. And that the said several sums and debts in the first eight counts respectively mentioned were and are parcels of the said several sums of money, and of the said supposed debts mentioned in those parts of the declaration in the said former suit, etc.; and that the defendant did not promise or undertake in respect of the said sums or debts in the first eight counts mentioned, or any of them, or any part thereof, otherwise than was alleged in

those parts of the declaration, in the said former suit, which are herein above set forth. [And the defendant further alleges that the said judgments rendered respectively as above mentioned were, and still are, final and conclusive in the said island of St. Christopher, according to the laws thereof, and were and still are a bar in said island to any further action by the said plaintiff in respect of the said supposed causes of action in the said counts of the plaintiff's present declaration mentioned.] And this, etc. Wherefore, etc.

Another plea of the same character from Callandar *v.* Dittrich.[1] Fourthly (to the first and second counts), that before the commencement of this suit, and before the commencement of the proceedings next hereinafter mentioned, the defendant was resident in parts beyond the seas, to wit, at Koenigsberg, in the kingdom of Prussia, within the allegiance of the King of Prussia, and within the jurisdiction of a certain court of judicature, called the Royal Prussian Court of Commerce and Admiralty of Koenigsberg; and that afterwards and whilst the defendant was resident at Koenigsberg aforesaid, and before the commencement of this suit, to wit, on, etc., the plaintiff impleaded the defendant, in the said court of judicature, for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been sustained by the plaintiff thereby; the same court having jurisdiction in the premises. And such proceedings were thereupon had in the said court that afterwards and before the commencement of this suit, to wit, on the 31st of May, 1839, a judgment or decree was pronounced by the said court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him, the plaintiff, through the non-performance of the said promises; and it was further ordered and decreed by the said judgment or decree that the plaintiff should pay the costs and expenses of the proceedings so had in the same court in that behalf; which judgment or decree was not in any way reversed or made void. And the

[1] 4 Man. & G. 68.

defendant says that the said judgment or decree was and is final and conclusive between the parties to such suit, as to the supposed cause of action in the country where the same was pronounced, to wit, in the kingdom of Prussia aforesaid; and that the plaintiff is precluded from all further litigation in respect of the same, and ought not further to importune or molest him, the defendant, in respect of such supposed cause of action, so adjudicated upon by the said judgment or decree as aforesaid. Verification.[1]

§ 10. *Estoppel by Deed. Replication in Trespass quare Clausum (to a Plea justifying the Entry under a Stranger as Owner) of a Demise from the Defendant.*[2]

And the defendant further says that the said M P ought not to be admitted or received to plead the said plea by her above pleaded, as to so much thereof as alleged that the said F W P, at the several times when, etc., was seised of the said dwelling-house, etc., in which, etc., in manner and form as in the said plea was alleged, because the plaintiff says that, before the committing of the several trespasses in the declaration mentioned, and before the said times when, etc., or any or either of them, to wit, on the 24th of March, 1836, the said M P demised the said dwelling-house, etc., in which, etc., to the plaintiff, to have and to hold the same to the plaintiff for the term of one whole year thence next ensuing, and fully to be complete and ended, and so on, from year to year, so long as the said M P and the plaintiff should respectively please, yielding the rent of £15, payable half-yearly, to wit, on the 29th of September and the 25th of March in every year, by even and equal portions; which said demise and tenancy from year to year continued in full force and undetermined, until at and after the said several times when, etc.; by virtue of which said demise the plaintiff afterwards, and before the said several times when, etc., or any or

[1] The judgment or decree produced, however, did not support the plea; but no objection was suggested to the *plea* either by counsel or by the court.

[2] Darlington v. Pritchard, 4 Man. & G. 783.

either of them, entered into and upon, and became and was possessed of the said dwelling-house, etc., in which, etc., for the said term so to him thereof demised as aforesaid, and remained and continued so possessed thereof, under and by virtue of the said demise from thenceforth until and at the said several times when, etc., in the declaration mentioned; that afterwards and before the said several times when, etc., to wit, on the 29th of September, in the year last aforesaid, the plaintiff paid to the said M P, and she, the said M P, then received from the plaintiff, the sum of £8, as and for the rent aforesaid, so reserved as aforesaid, for a certain time, to wit, for one half-year ending on the day and year last aforesaid; and that afterwards, on each and every 25th of March and 29th of September, which happened in every year from the time of the making of the said demise, until the said several times when, etc., the plaintiff, as tenant as aforesaid, duly paid to the said M P, and the said M P, as the landlady of the plaintiff as aforesaid, received and accepted from the plaintiff, all and every part of the rent which respectively grew due to the said M P from the plaintiff, under the demise and tenancy as aforesaid. Verification, and prayer of judgment if M P ought to be admitted or received, against the said demise and acceptance of rent as aforesaid, to plead the said plea by her above pleaded, as to so much thereof as alleged that the said F W P, at the several times when, etc., was seised of the said dwelling-house, etc., in manner and form, etc.

§ 11. *Estoppel in Pais. Replication to a Plea of the Incompetency of the Payee of a Bill to indorse the same.*

The following replication, in an action by the indorsee of a bill of exchange against the acceptor, was held good on demurrer in Smith *v.* Marsack:[1] That the defendant ought not to be permitted or received to plead the said plea by him above pleaded to the said second count of the declaration, or to say that the said C W, before and at the time she indorsed the said bill in the said second count mentioned, was the wife of the said E W, and that the said E W had not authorized or con-

[1] 6 C. B. 486.

sented to the said indorsement of the said bill by his said wife, or that the said C W had no power to indorse the said bill, and to transfer to the plaintiff the property therein, because the plaintiff says that the said C W was a married woman, and the wife of the said E W before and at the time when she made the said bill in the said second count mentioned, and before and at the time of the acceptance of the said bill by the defendant, as well as at the time of the indorsement of the said bill to the plaintiff, as he, the defendant, before and at the said several times of the making and accepting and indorsing of the said bill respectively had, and had always had, full notice and knowledge; that the plaintiff had not, either before or at the said several times of the making and accepting and indorsing of the said bill respectively, or either of them, or at any time before the commencement of this suit, known[1] that the said C W was a married woman and the wife of the said E W, or that she had not power or authority to indorse the said bill, and to transfer to the plaintiff the property therein; that he, the plaintiff, at the time of the indorsement of the said bill to the plaintiff, as in the second count mentioned, gave full value to the said C W for the indorsement of the said bill by the said C W to the plaintiff; and that he, the plaintiff, gave such value, and took the said bill, and became the indorser thereof, as in the said second count mentioned, upon the faith and credit of the defendant's acceptance of the said bill, and the said C W's having power, and being a person competent, qualified, and able to indorse the said bill to the plaintiff, and to transfer to the plaintiff the property in the same. Verification, and prayer of judgment if the defendant ought, contrary to his said acceptance of the said bill in the said second count mentioned, and to his own act and acknowledgment, to be admitted to say that the said C W, at the time of the said indorsement by her of the said bill in the said second count mentioned, was the wife of the said E W, and that the said E W had not at any time authorized or consented to the said indorsement of the said bill by his said wife, or that the said C W had no power to indorse the said bill and to transfer the property therein.

[1] As to this see ante, p. 498.

INDEX.

INDEX.

ABATEMENT,
of writ, 53.
ACCEPTANCE OF BILL OF EXCHANGE,
admission of signature of drawer, 480–495.
not of indorser in ordinary cases, 483.
except when, 484.
acceptance for honor, 488.
warrants capacity of drawer and of payee, 495.
See BILLS AND NOTES.
ACCOUNT,
effect of auditing, 693.
ACKNOWLEDGMENT OF RECEIPT,
under seal not conclusive, 383, 476.
acknowledgments in parol, 471–476.
generally not conclusive, 471.
exceptions, 473.
acknowledgment in policies of marine insurance, 473.
where acknowledgment has been acted on by third person, 473.
warehouse receipts, 474.
bill of lading, 475.
receipt given an attaching officer, 476.
ACQUIESCENCE,
only a fact tending to create a right, 457.
when estoppel is raised by, 457, 620, 683, 693.
ACQUITTAL OF GOODS,
conclusiveness of judgment of, 226.
ACT OF LEGISLATURE,
when party estopped to dispute constitutionality of, 689.
ACTION,
in personam and in rem by the Roman law, 42, 43.
in Bracton, 44.
in Coke, 44.
in modern English law, 44.
when prematurely brought, judgment no estoppel, 56, note.
form of, immaterial to estoppel, 200.
See CAUSE OF ACTION; PLEADING, PRACTICE, AND EVIDENCE.
ADJUDICATION.
See JUDGMENTS.

ADJUSTMENT OF LOSS,
by insurance company, 649.
ADMINISTRATORS,
verdict for plaintiff in suit against, on plea of plene administravit, 78, 279.
no privity between administrator or executor and heir or devisee, 146, 147.
relation of administrator de bonis non to his predecessor, 148.
not like executor of executor, 148.
of different states or countries, 149.
when estopped to claim property found among assets of the estate, 554.
not estopped to amend inventory when, 555, note.
when estopped to deny having funds, 555, note.
estoppel against one of several estops all, 599.
inducing administrator to proceed to an inventory, 645, note.
See PROBATE, DECREES OF.
ADMIRALTY,
English court of, an inferior court, 205.
otherwise of Federal courts of United States, 205, 206.
conclusiveness of domestic judgments in, 206.
adjudications of prize in, 221.
conclusive both of change of property and ground of judgment, 221.
adjudications in cases of collision, 222.
foreign judgments in, 223.
breach of warranty of neutrality under insurance policy, 240.
finding that vessel was enemy property, 240.
immaterial that sentence was erroneous, 242.
sale of wreck and derelict, 246.
judgments in, conclusive only of necessary matters, 247.
possible qualification of rule, 248.
obscure statements of record, 249.
jurisdiction of court, 250–253.
constitution of foreign tribunal, 253.
fraud in obtaining judgment, 254.
ADMISSION,
estoppels considered as, 329, note.
admissions in court, 571, note.
no estoppel unless acted on, 638.
ADVERSARY PARTIES,
rule of res judicata in regard to, 101.
AFTER-ACQUIRED PROPERTY.
See COVENANTS.
AGENCY,
judgment against principal, effect on agent, 120–127.
effect of suit by agent in his own name in right of principal, 126.
distinguished from estoppel, 457, 565.
holding one out as agent, 565.
representations of agents, 598.
assuming to act as principal, 687.

AGREED JUDGMENTS,
conclusiveness of, 72.
ALGIERS,
courts of, 239.
ALIMONY,
effect of decree of divorce, 276, 277.
'ALL DEMANDS,' 166.
'ALL RIGHT,' 581, 582.
APPEARANCE,
by attorney, 208.
special, to contest jurisdiction, 290.
APPOINTMENT, POWERS OF,
election growing out of exercise of, 678.
ARBITRATION AND AWARD,
when conclusive, 68.
ASSIGNEE OF PATENT,
not permitted to deny validity of patent when, 552, 553.
ATTACHMENT,
proceedings in, properly in personam, 49, 234.
foreign attachment, 300.
agreement to hold goods under, for plaintiff, 549, 567.
ATTORNEY,
denial of authority to appear in cause, 208.
appearance by, 208, 290.
ATTORNMENT,
lessee may explain circumstances of, 523.
AUDITING ACCOUNT,
effect of, 693.
AWARD,
when conclusive, 68.

BAILOR AND BAILEE,
under what circumstances bailee estopped to deny bailor's title, 548-552.
relation analogous to that of landlord and tenant, 548.
wharfinger's possession, 549.
receiptor for goods attached by officer, 549, 567.
estoppel ends with dispossession, 549.
BANKRUPTCY,
adjudications upon validity of insolvency laws, 86.
effect of judgment under insolvency laws, 283.
non-disclosure of discharge in, 589.
BARGAIN AND SALE, DEEDS OF,
origin of, 425.
void at law at first, 425.
effect of, in chancery, 425.

BARGAIN AND SALE, DEEDS OF, — *continued.*
effect of clause of warranty before the Statute of Uses, 427.
effect of Statute of Uses upon this mode of conveyance, 428–446.
whether it can pass future interests, 428–446.
question considered, 438–446.
distinction between case of grantor with and without seisin, 438.
grantee of grantor having no seisin takes nothing, 438.
warranty in such case, 439.
no lien created so as to affect second grantee without notice after title acquired, 441.
no privity between grantor and grantee, 441.
conveyance by disseisor, 444.
See TITLE BY ESTOPPEL.

BILL IN CHANCERY,
dismissal of, 53, 58, 61.

BILL OF LADING,
conclusiveness of, 475.

BILLS AND NOTES,
'notes and other demands,' 166, 167.
action on two notes and withdrawal of one, 168.
admission of genuineness, 480–495.
acceptor of a bill estopped to deny signature of drawer, 481.
effect of usage or agreement, 481, note.
indorser estopped to deny signatures of prior parties, 482.
admission of one's own signature, 482, note.
acceptor not estopped to deny genuineness of any indorsement, 483.
unless indorsement was put on the bill by the drawer before acceptance, 484.
or unless bill is payable to fictitious person, 485.
or unless bill accepted with knowledge, 486.
estoppel of acceptor extends only to signature, and does not embrace body of the paper, 486.
acceptance conclusively admits procuration to draw, 488.
but not to indorse, 488.
whether acceptance for honor is an admission of signature of the party for whose honor acceptance is given, 488.
consequence of discovering forgery too late to fix liability of prior parties, 490.
effect of paying bill by acceptor whose acceptance is forged, 491.
acceptor not estopped to deny genuineness of drawer's signature where holder took the bill *before* acceptance, 491.
effect of receiving forged paper as one's own genuine paper, 492.
rule where holder, by custom or agreement, takes upon himself the duty of inquiry, 492.
when holder aids in mistake of acceptor, 492.
person selling bill or note without indorsing it warrants its genuineness, 494.
negligence in drawing check or bill, 494.

BILLS AND NOTES, — *continued.*
admission of capacity, 495–499.
execution of note an admission of payee's capacity to indorse, 495.
so of acceptance of bill, 495.
maker or acceptor cannot therefore allege that payee was a married woman, or a bankrupt, 496.
admission not prospective, 497.
indorsement implies warranty of capacity of all prior parties, 498.
guarantor of bond estopped to deny competency of makers, 498.
certification of checks, 499–505.
bank estopped in New York and other states by teller's certificate 'good,' 500.
contra in Massachusetts, 500.
what amounts to certification, 504.
transfer by indorser after liability fixed, 504.
statement that note is 'all right,' 581, 582.
BLOCKADE,
judgment of breach of, 248.
BOARD OF TRADE,
holding oneself out as member of, 565, note.
BONDS,
recitals in, 377, 467.
when corporation estopped to set up invalidity of, 461–470.
BOUNDARY,
conclusiveness of decrees of commissioners of, 233.
land bounded in deed by street, 370.
knowledge of true boundary necessary in many states in order to raise an estoppel, in fixing line, 619.
otherwise in other states, 620.
long acquiescence, 620.
limits of the estoppel, 621.

CAPACITY,
admission of that of drawer and payee of bill, 495–499.
CAUSE OF ACTION,
recurring damages, 171, 172.
concealment of, 197.
CERTAINTY,
required in all estoppels, 61, 366, 578.
CERTIFICATION OF CHECKS,
in New York and elsewhere, 500.
effect of, in Massachusetts, 500.
what constitutes certification, 504.
CHANCERY,
dismissal of bill, 53, 58, 61.
when decree final, 59.
when decree in, no bar to suit at law, 59.

CHANCERY, — *continued.*
judgment at law conclusive in, 201, 285.
restraining actions at law upon judgments, 302–307.
CHECKS,
certification of, 499–505.
CHURCH COURTS,
decrees in, 65.
COLLATERAL WARRANTY,
explained, 387.
COLLEGE ORDERS,
conclusiveness of, 64.
COLLISION,
adjudication concerning, 222.
COLLUSION,
distinguished from other fraud, 213, 219, note.
a ground of impeaching judgments, 213, 219, note.
COMMERCIAL PAPER.
See BILLS AND NOTES.
COMMON RECOVERY,
operation of, 418.
COMMON TITLE,
disputing, 357.
COMMONWEALTH,
estoppel against, 341.
COMPETENCY OF PARTIES.
See CORPORATIONS; INFANTS; LUNATICS; MARRIED WOMEN.
COMPTROLLER OF CURRENCY,
decisions of, 66.
CONCEALMENT,
silence when one should have spoken, 586.
See CONDUCT, ESTOPPEL BY.
CONDEMNATION OF GOODS,
conclusiveness of judgment of, 224–226.
CONDUCT, ESTOPPEL BY,
origin of, 557.
doctrine in equity, 557.
Pickard *v.* Sears, 558–569.
holding out another as owner of property, 560.
or as having right to dispose of it, 560.
principle of the estoppel, 561.
married women doing business for themselves, 561.
conduct of cestui que trust may estop him, 561.
signing note as principal, 562.
allowing stock to be registered in one's name, 563.
receiptors for goods levied upon, 567, 568.
essentials to this estoppel, 570.

CONDUCT, ESTOPPEL BY, — *continued.*
there must have been a representation or concealment of material facts, 570.
the representation must have been made with knowledge, 570.
the party to whom it was made must have been ignorant of the facts, 570.
it must have been made with the intention that it should be acted on, 570.
the party must have been induced to act upon it, 570.
the representation, 570–609.
there need not be an express representation, 570.
must concern *facts*, 572.
must have reference generally to a present or past state of things, and not to future, 574.
exception, 577.
estoppel in pais distinguished from contract, 576.
representation must be plain, 578.
not a matter of inference, 578.
such as would naturally be acted on, 582.
representation obtained by fraud, 583.
silence when operating as estoppel, 584.
'standing by,' 585, 665, 671.
illustrations of rule of silence, 585, 588.
when silence will not raise estoppel, 588–595.
illustrations, 588–595.
silence concerning title of record, 594.
possession is notice, 595.
when a duty to speak exists, 595, 596.
affects only parties and privies, 597.
rule covers representations of agents, 598.
married women, 599, 600.
admissions of one of several administrators which estop him estop all, 599.
whether married women may be estopped by conduct, 599.
rule in Massachusetts, 599, 600.
rule in Illinois, 601.
rule in Indiana, 601.
rule in Pennsylvania, 602.
in cases of fraud without contract, 602.
action of contract cannot be maintained, 604.
whether infants may be estopped in pais, 605.
conflict of authority, 605, 606.
question considered, 606.
doctrine of privity prevails, 607, 608.
illustrations, 608.
whether a purchaser of goods in privity with the seller, 609.
knowledge of the facts, 609–626.
the rule stated, 611.
means of knowledge, 611.

CONDUCT, ESTOPPEL BY, — *continued.*
forgetfulness of facts, 615.
mistake, 618.
in cases of boundary, 618.
there must have been knowledge of the true boundary when incorrect one was agreed upon in order to an estoppel, 619.
different rule in some states, 620.
long acquiescence sufficient in these states, 620.
limits of the estoppel, 621.
mere survey raises no estoppel, 622.
warehouse receipts given by mistake, 622.
applying for shares in corporation in ignorance of its condition, 623.
ignorance the result of gross negligence, 626, note.
the intention, 628–637.
the general rule, 629.
intention may be actual or presumable, 629–635.
party must know that representation would be acted upon, 629, 636.
term 'wilful' in Pickard *v.* Sears, 630.
in most cases the representation must amount to the contract or license of the party making it, 631, note.
effect of negligence, 631.
cases of dedication, 635.
dedication may be in pais, 635.
purport of inquiry not understood, 636.
representation must have been acted upon, 638–652.
the general rule, 638.
no mere statement or admission can estop, 638.
not material *how* acted on, 639.
refraining from steps, 639.
doing only what one is bound to do, 639.
whether it must be exclusively acted on, 639, 640.
representation must have been made before or at the time of change of position, 639, note.
of value of horses, 641.
of title to stock, 641.
sheriff's return when an estoppel, 642.
terms of charter-party, 644.
damage, 645.
illustrations, 645.
damage may be presumptive, 645.
false statement inducing suit, 645.
inducing administrator to make inventory, 645, note.
misrepresentation concerning delivery order, 646.
delivery orders, 646–649.
adjustment of loss by insurance company, 649.
effect of the estoppel, 651.
estoppel by waiver, 660–672.
CONFESSION OF JUDGMENT,
rule in America, 73.

CONFESSION OF JUDGMENT, — *continued.*
rule in England, 73.
CONSIDERATION,
recitals of, 383, 471.
CONSPIRACY, 217.
CONSTITUTIONALITY OF LAW,
estoppel to deny, 81, 86, 530, 689.
CONSULAR COURTS,
conclusiveness of judgments of, 324.
CONTINUING DAMAGES,
judgment in cases of, 171, 172.
CONTRACT,
judgment against one of several joint contractors, 104–110.
judgment on contract followed by cross-action for negligence, breach of warranty, or fraud, 174–187.
splitting up contracts, 197.
as ground of estoppel by deed, 332.
estoppel by contract, 459.
when party estopped to deny validity of, 461–470, 684.
agreement upon a fact as basis of action, 459–461.
distinguished from estoppel, 576.
acceptance of terms of contract, 684.
invalid contract acted on, 685.
receiving benefits of, 685.
joint contract, 694, note.
CORAM NON JUDICE,
judgment must have been by a legally constituted court, 61.
illustrations, 61–63.
CORPORATIONS,
effect on stockholders of judgment against, 137.
deed in excess of powers, 349–352, 461–470.
disputing existence of corporation, 461.
counties and towns, 462.
setting up defects in organization of body, 463.
right of a party dealing with a supposed corporation to deny the legal existence of the body, 463.
ultra vires may be shown when, 466–468.
the question generally one of agency, 468.
purchasers of bonds certified in due form, 469.
membership of corporation effected by estoppel, 563.
paying calls, 563.
representations by agents, 598.
directors affected with notice when, 611.
CO-SURETIES,
effect of judgment against one upon others, 145, 146.
See SURETY.
COUNTER-CLAIMS,
right to sue for after judgment in favor of other party, 174–187.

COURTS,
judgment must be given generally by lawful court of justice, 61.
exceptional cases, 64–67.
English admiralty an inferior court, 205.
otherwise of Federal courts of United States, 205, 206.
jurisdiction of, 250–253.
constitution of foreign court may be examined, 253.
presumption as to, 253.
Federal not foreign to state, 286.
effect of judgment in consular courts, 324.
See COURTS-MARTIAL; INFERIOR COURTS; JUDGMENTS; JURISDICTION; MILITARY COURTS.

COURTS-MARTIAL,
conclusiveness of judgments of, 65.

COVENANTS,
of warranty in old common law, 386.
operate as a rebutter, 388.
in modern times, 389.
depend upon nature of grant and of warranty, 400.
effect of, upon after-acquired title at the present time, 406, 407.
for quiet enjoyment, 407.
covenants of title, seisin, and right to convey, 408.
for further assurance, 408.
not a conveyance, 440.
nor a lien so as to affect a subsequent purchaser without notice, 441.
See TITLE BY ESTOPPEL.

CREDITOR AND DEBTOR,
judgment in fraud of creditors, 216.
no privity between, 343.

CRIMINAL CAUSE, JUDGMENT IN,
doctrine of jeopardy, 88.
effect in civil suit, 115, 116.

CROSS-ACTION,
right of, after judgment for opposite party, 174–187.

CUMULATIVE REMEDIES,
effect of judgment in case of, 191, 192.

CURTESY,
husband not estopped to claim when, 448, note.
tenant by, whether estopped by his tenancy, 542.

CUSTOM,
custom of London in foreign attachment, 138, 139.
judgments incidentally establishing, 234.

DAMAGE,
continuing, 171, 172.
an essential part of estoppel by conduct, 638–652.
will be implied in some cases, 645.
false statement inducing suit, 645.

DECEIT,
compared with equitable estoppel, 570, note.
DECLARATION,
judgment for insufficiency of, 53.
DECREES,
in Chancery, 58.
See JUDGMENTS.
DEDICATION,
when effectual by estoppel, 635, 668.
DEED,
estoppel by deed as resting on contract, 331, note.
defined, 332.
division of subject, 333.
parties and privies, 334–348.
deed binds such only, 334.
parties, 334–341.
boundaries upon streets, 334, note.
illustrations of the rule, 334.
persons acting under authority of grantee, 336.
deed under which grantee does not claim, 336.
estops parties only in the character in which they appear, 337.
guardian's deed, 338.
parties must be sui juris, 339.
covenants of married women, 339, 340.
deed of infant, 340.
estoppel by deed against the state, 341.
privity, 341–348.
assignee of lessee, 342.
other cases, 342–344.
privy in estate, 343, note.
no privity between judgment creditor and debtor, 343.
effect of acceptance of, in regard to dower, 344.
apparent conflict on this point, 344.
question considered, 345.
relation of doctrine of privity to the point, 345.
what privity of estoppel means, 347.
no privity of estoppel between grantor and grantee, 356.
deed must be valid in order to an estoppel, 349–352.
and delivered, 349.
deed executed in violation of injunction, 349, note.
by corporation in excess of powers, 349–352.
in contravention of statute, 351.
void only as to one of several grantors, 352.
deed void in part, 352.
deed procured by fraud, 352.
no estoppel in collateral matters, 352.
proceedings growing out of the deed, 354.
joint grant, 355.

DEED, — *continued.*
grantee in deed-poll, 356.
whether one who accepts a deed from another estopped to deny his title, 356.
purchaser buying in better title than that of his vendor, 357.
when he can set up paramount title, 357–360.
may show eviction, 359.
estoppel against estoppel, 360.
estoppel in pais against estoppel by deed, 361.
if truth appears on face of, no estoppel arises, 361.
limitations of rule, 362.
in actions of covenant and ejectment, 362, 363.
recitals, 365–388.
particular recitals conclude, 365–376.
illustrations, 365–368.
land bounded on street, 370.
land sold subject to mortgage, 371.
recitals in patents, 372.
sureties in bonds, 373.
homestead, 374.
recital of law, 375.
general recitals do not ordinarily estop, 377–388.
examples, 377–380.
exception, 380.
recital of immaterial facts, 382.
date of deed, 382.
ground of estoppel by recital, 382.
acknowledgment of receipt in a deed, 383.
not conclusive, 383.
title by estoppel, 384–417.
See TITLE BY ESTOPPEL.
release of dower, 448–450.
See DOWER.
witnessing another's deed, 571.
DEED-POLL,
grantee in, 356.
DEFAMATION,
repetition offered in evidence, 172.
DEFAULT,
judgment by, 75, 186.
DELIVERY BONDS,
conclusive of what, 567.
DELIVERY ORDERS,
effect of, 474, 567, 622.
DEMURRER,
decision on, conclusive when merits involved, 53, 54, 58.
DEPOSITIONS.
sworn, 571, note.

DEPUTY-SHERIFF,
effect on sheriff of judgment against, 122.
DERELICT,
sales of wreck and derelict conclusive on all persons, 246.
DIRECTORS OF CORPORATION,
affected with notice estopped, 611.
See CORPORATIONS.
DISCLAIMER,
under what circumstances effectual to remove estoppel, 534.
DISCONTINUANCE OF SUIT,
effect of, 53, 61, note, 72.
DISMISSAL OF SUIT,
effect of, 53, 54, 72, 73.
DIVORCE,
judgment in suit for, 227–229.
jurisdiction in causes of, 243.
suit for alimony after decree of divorce, 276, 277.
See MARRIAGE AND DIVORCE.
DOMESTIC JUDGMENT,
See JUDGMENTS, DOMESTIC.
DOMICIL,
decisions in regard to, 232, 245.
DOWER,
whether acceptance of deed estops grantee to dispute widow's claim to, 344.
release of, 448.
wife not estopped without release, 448, note.
conveyance by husband of his wife's land, wife affixing her signature and seal, 448, 449.
release of dower in fraudulent conveyance, 449.
effect of election to take under will, 675, 678.
DURESS,
representation obtained by, 583.

EJECTMENT,
effect of judgments in, 128, 129.
ELECTION, INCONSISTENT POSITIONS,
party cannot occupy inconsistent positions, and the first taken will be held a conclusive election, 673.
one who has taken beneficial interest under will estopped to deny its validity in equity, 674.
examples, 674, 675.
testator devising another's property to whom he makes a gift, 675.
by married women and infants, 675.
widow's election to take under will, 675, 678.
doctrine of election not applied when, 676.
intention to dispose of property must appear in will, 677.

ELECTION, INCONSISTENT POSITIONS, — *continued.*
how election excluded, 677.
election by heir, 677.
property given subject to burdens, 677.
election arising under exercise of powers of appointment, 678.
what constitutes election, 679–683.
any decisive act with knowledge is an election, 679.
party taking possession of property, and holding and managing it, 679.
result of the cases, 683.
instituting suit to contest will, 683.
acquiescence and waiver, 683.
beneficiaries under trust estopped to impeach trust, 683.
acceptance of terms of contract, 684.
invalid contract acted upon, 685.
examples, 685.
receiving benefits of sale, 685.
limitation of the rule of estoppel in such cases, 686.
indirect benefit received, 686.
collecting or receiving money for another, 686.
taking appointment of trust, 686.
assuming to act as principal, 687.
stockholder in corporation receiving dividends, 687.
wrongful severance of fixtures, 687.
persons who have procured the passage of an act estopped to deny its constitutionality, 689.
but in general no estoppel to deny validity of statute, 689, note.
joining in petition for opening or improving street, 691.
levying tax to pay compensation for laying out street, 691.
levying taxes generally, 692.
other cases of similar nature, 692.
improper use of term 'estoppel' in many of the cases, 693.
examples, 693.
ratification only an element of estoppel, 694.
contracting jointly, 694, note.

EMPLOYEES,
effect of accepting employment, 552.

ENEMY PROPERTY,
condemnation of vessel as, 247, 248.

ENTIRE DEMAND,
continuing damages, 171, 172.
not to be split in ordinary cases, 197.
concealment of part of cause of action, 197.
what constitutes, 197.

ENTRY, WRIT OF,
effect of judgment in, 98.

EQUITABLE ESTOPPEL,
origin, 557.

EQUITABLE ESTOPPEL, — *continued.*
doctrine in equity, 557.
doctrine of Pickard *v.* Sears, 558–569.
leading cases in America, 569.
essentials to this estoppel, 570.
there must have been a representation or concealment of material facts, 570.
the representation must have been made with knowledge, 570.
to one ignorant of the facts, 570.
it must have been made with intention that it should be acted on, 570.
it must have been acted on, 570.
the representation, 570–609.
need not be express, 570.
must concern *facts*, 572.
must have reference generally to present or past state of facts, and not to future, 574.
exception, 577.
estoppel by conduct distinguished from contract, 576.
representation must be plain, 578.
not a matter of inference, 578.
such as would naturally be acted on, 582.
representation obtained by fraud, 583.
silence when operating as estoppel, 584.
'standing by,' 585.
illustrations of rule of silence, 585, 588.
when silence will not raise estoppel, 588–595.
silence concerning title of record, 594.
possession is notice, 595.
when duty to speak arises, 595, 596.
affects only parties and privies, 597.
rule covers representations of agents, 598.
admission of one of several administrators which estops him estops all, 599.
whether married women subject to estoppel in pais, 599.
rule in Massachusetts, 599, 600.
rule in Illinois, 601.
rule in Indiana, 601.
rule in Pennsylvania, 602.
in cases of fraud without contract, 602.
action of contract cannot be maintained, 604.
whether infants subject to estoppel in pais, 605.
conflict of cases, 605, 606.
question considered, 606.
doctrine of privity prevails, 607, 608.
knowledge of facts, 609–626.
rule stated, 611.
in cases of boundary, 618.
knowledge of true boundary required in many states, 619.

EQUITABLE ESTOPPEL, — *continued.*
different rule in other states, 620.
long acquiescence, 620.
limits of the estoppel as to boundaries, 621.
mere survey raises no estoppel, 622.
warehouse receipts given by mistake, 622.
applying for shares in corporation in ignorance of its condition, 623.
ignorance the result of gross negligence, 626, note.
the intent, 628–638.
party must know that representation will be acted on, 629, 636.
term 'wilful' in Pickard *v.* Sears, 630.
in most cases representation must amount to contract or license, 631, note.
effect of negligence, 631.
cases of dedication, 635.
purport of inquiry not understood, 636.
representation must have been acted on, 638–652.
representation must have been made before or at time of change of position, 639, note.
misrepresentation as to character of warrant, 640.
of value of horses, 641.
sheriff's return, when an estoppel; 642.
damage may be presumptive, 645.
Knights *v.* Wiffen, and other cases, 645–649.
false statement inducing a suit, 645, note.
inducing administrator to proceed to an inventory, 645, note.
delivery orders, 646–649.
adjustment of loss by insurance company, 649.
effect of the estoppel, 651.

EQUITY,
dismissal of bill in, 53, 58, 61.
when decree final, 59.
verdicts out of, 101.
judgment at law conclusive in, 201, 285.
restraining actions on judgments, 303–308.

ERROR,
no ground of impeaching judgments, 52, 242, 261.

ESTATES BY ESTOPPEL,
history of the doctrine, 384–390.
at common law only four kinds of assurance possessed the efficacy of passing after-acquired interests, 385.
operation of feoffment, 385, 414.
the old common-law warranty, 386.
lineal warranty, 386.
collateral warranty, 387.
modern warranty, 389.
leases, 390–394.
where no interest passes, 390.

ESTATES BY ESTOPPEL, — *continued.*
where an interest passes, 391.
the doctrine explained, 393.
between grantor and grantee, 394–413.
title by estoppel without warranty, 396.
under statutes, 398.
title by estoppel in deeds with warranty, 399.
effect of deed depends on nature of grant and warranty, 400.
covenant of warranty limited to estate granted, in certain states, 402.
rule different in other states, 403.
grants with warranty by trustees, executors, and the like, 404.
rights of way, 404.
construction of language not in form of warranty, 404.
effect of mill acts, 405.
extinguishment of covenants, 406.
fraudulent conveyance, 406.
improvements erected by grantor, 407.
covenants for quiet enjoyment, 407.
distinction between covenants of seisin and those for further assurance, 408.
implied warranty in partition of land, 409.
grantee before and grantee after title acquired, 413–446.
estoppel at common law in case of feoffment, 414.
whether the interest passed by reason of the warranty, 417.
operation of the fine, 417.
operation of the common recovery, 418.
operation of lease, 420–423.
explanation of, 421–423.
operation of the release, 423.
operation of the lease and release, 423.
operation of the grant, 424.
operation of the bargain and sale, 424–428.
origin of the same, 425.
void at law originally, 425.
effect of a warranty in, 427.
result of consideration of law prior to the Statute of Uses, 428.
conveyances under this statute, 428–446.
consideration of bargain and sale, 428–446.
decisions in favor of the estoppel against second grantee, 429–433.
cases contra, 433–438.
consideration of question, 438–446.
distinction between cases where grantor had seisin and where he had not, 438.
where grantor had not seisin, 438–443.
such a case not within the Statute of Uses, 438.
what necessary to pass title under the statute, 438–440.
warranty never possessed power of conveyance, 440.
nor can it operate as a lien against innocent purchaser, 441.
effect of registry laws, 441.

ESTATES BY ESTOPPEL, — *continued.*
no privity between second grantee and his grantor, 441.
cases distinguished, 443.
grantee with seisin, that is, as disseisor, 444.
first grantee now acquires an estate under the Statute of Uses, 444.
title by estoppel may prevail now without a rebutter, 445.
title by estoppel as to personalty, 446.

ESTOPPEL,
nature of, 3.
justification of the law in its early appearance and continual expansion, 4, 5.
supposed odiousness, 5, 6.
may create a right in personam or in rem, 6.
Further, see special divisions.

ESTOPPEL AGAINST ESTOPPEL,
sets the matter at large, 360.

EVICTION,
removes estoppel of tenant when, 520.
eviction by law not necessary, 522.

EVIDENCE.
See PLEADING, PRACTICE, AND EVIDENCE.

EXCEPTIO REI JUDICATÆ,
in the Roman law, 41.

EXECUTION,
stay of, 73, note.

EXECUTORS AND ADMINISTRATORS,
verdict for plaintiff in suit against, on plea of plene administravit, 78, 279.
effect of judgment against by default, 78.
no privity between administrator or executor and heir or devisee, 146, 147.
relation of administrator de bonis non to his predecessor in the administration, 148.
not like executor of executor, 148.
residing in different states, no privity between, 149.
when estopped to claim property found among assets of the estate, 554.
not estopped to amend inventory when, 555, note.
when estopped to deny having funds, 555, note.
estoppel against one of several estops all, 599.
inducing to proceed to inventory, 645, note.

FEDERAL COURTS,
not foreign to state courts, 286.

FEOFFMENT,
operation of, 385, 414.

FERRY, PUBLIC,
judgment incidentally establishing, 36, note, 234.
FINDINGS,
effect of, 48, 223, 231, 241, 247, 249.
See INFERENCES, GROUNDS, AND FINDINGS.
FINE,
operation of, 417.
FISHERY,
judgment establishing, 36, note.
FIXTURES,
wrongful severance of, 687.
FOREIGN COURTS,
jurisdiction of, may be examined, 250.
presumption, 253.
so of constitution of tribunal, 253.
consular courts, 324.
See JUDGMENTS, FOREIGN.
FOREIGN JUDGMENTS,
in rem, 236–253.
in personam, 256–325.
See JUDGMENTS, FOREIGN.
FORGERY,
admission of genuineness, 480–495, 632.
See BILLS AND NOTES.
FORGETFULNESS,
when it may be replied to estoppel by conduct, 615.
FORM OF ACTION,
change of, 86, 200.
FORMER ACQUITTAL, 89.
FORMER CONVICTION, 89.
FORMER JUDGMENT,
plea of judgment for defendant for premature action, 56, note.
nature of plea of, 80–90.
causes of action must be identical, 80.
plea of non est factum as to a bond, judgment sustaining, as bar to special promise to pay the bond, 81.
plea of judgment in an action for failing to remove a wreck, 82.
plea of judgment for defendant in an action of contract, as bar to suit for fraudulent representations concerning the contract, 83.
plea of judgment for defendant in an action for false representation of soundness, as a bar to an action on warranty, 83.
action for goods sold defeated by special promise, and subsequent suit on the special promise, 83.
cases of recurring liability, 85.
tax assessments and debts due by instalment, 85, 86.
form of action immaterial, 86.
evidence of identity, 88.

FORMER JUDGMENT, — *continued.*
doctrine of twice in jeopardy, 88, 89.
trespass quare clausum, plea of judgment in, as bar to an entry sur disseisin, 98.
FORMER RECOVERY.
See FORMER JUDGMENT.
FORMER VERDICT,
nature of plea of, 90.
causes of action need not be identical, 90.
doctrine of Duchess of Kingston's Case, 91, 92.
of Outram *v.* Morewood, 93, 94.
other cases, 95–97.
judgment for defendant on one of two notes by reason of a defence common to both, 95, 96.
plea of fraudulent alteration of note, and reply of judgment obtained on the note, 96, 97.
suit upon a special contract pleaded by opposite party in a former action and there denied by plaintiff, 97.
judgment in ejectment conclusive of right to mesne profits, 97.
result of the cases stated, 99.
verdicts out of equity, 101.
judgment against several parties, rights inter sese, 101, 102.
FRAUD,
concealment of cause of action, 197.
when ground of impeaching judgments, 209–220, 254, 302–307.
term 'fraud' defined, 218.
representation obtained by, 583.
FURTHER ASSURANCE, COVENANT FOR,
effect of, 408.

GARNISHMENT,
effect of judgment against garnishee, 138.
voluntary payment by garnishee, 138.
custom of London, 138, 139.
if execution satisfied, garnishee discharged pro tanto, 139.
original creditor may prove his claim greater than admitted, 139.
judgment must have been valid, 139, note.
and real, 139, note.
all defences must have been made, 139, 141.
court must have had jurisdiction, 140, note.
foreign judgments on, 314–317.
'GOOD,'
certification of a check as, 500.
answer of maker of a note on inquiry, 580, 581.
GOVERNMENT,
estoppel against, 341.

GRANT, DEED OF,
operation, 424.
GRANTOR AND GRANTEE,
not in privity, 356.
title by estoppel between, 394–413.
See TITLE BY ESTOPPEL.
GROUNDS OF DECISION.
See INFERENCES, GROUNDS, AND FINDINGS.
GUARANTOR,
no privity between, and principal, 145, 146.
GUARDIAN,
deed of, with warranty, 338.

HEIR,
not in privity with executor or administrator, 146, 147.
election by, 677.
HUSBAND AND WIFE,
husband's representations cannot bind wife, 598, note.
See MARRIAGE AND DIVORCE; MARRIED WOMEN.

IDENTITY OF CAUSE OF ACTION,
necessity of, to support plea of former judgment, 80.
test of, 84.
IGNORANCE.
See KNOWLEDGE OF FACTS.
IMMATERIAL FACTS,
verdicts on, 157, 247.
IMPEACHMENT OF JUDGMENTS,
for want of jurisdiction, 202–208, 250, 288.
for fraud, 209–220, 254, 302–307.
See JUDGMENTS.
IMPROVEMENTS,
erected by grantor of deed with warranty inure to grantee, 407.
made under license, 665.
INCIDENTAL MATTERS,
effect of verdict upon, 157, 247.
what meant by incidental matter, 158.
various illustrations showing judgment not to be binding, 247, 248.
INCONSISTENT ACTS,
election between, 673–694.
See ELECTION.
in court, 717–723.
INCREMENT,
damages by, 170, 171.
INDORSEMENT,
warrants genuineness of negotiable paper, 482.
acceptor may deny genuineness of, 483.

INDORSEMENT, — *continued.*
unless when, 484–486.
INFANTS,
whether concluded by judgment, 117, 118.
decree appointing tutor, 233.
not estopped by deed, 340.
whether subject to estoppel in pais, 605.
conflict of authority, 605, 606.
question considered, 606.
election by, may bind, 675.
INFERENCES, GROUNDS, AND FINDINGS,
judgment establishes necessary when, 48, 152, 158, 223, 231, 232, note, 241, 247, 249.
New York rule in regard to judgments in rem, 48, note, 241.
INFERIOR COURTS,
judgments of, conclusive when, 66.
superior courts not proceeding according to course of the common law, 204.
of sister states, 319–325.
consular courts, 324.
INJUNCTION,
against suing on judgment, 303.
on ground of estoppel in pais, 716.
IN PAIS, ESTOPPEL.
See AGENCY; BILLS AND NOTES; CONDUCT, ESTOPPEL BY; CORPORATIONS; ELECTION; ESTOPPEL; LANDLORD AND TENANT; PARTNERSHIP.
INSOLVENCY LAWS,
adjudications upon constitutionality of, 86.
effect of judgments under, 283.
INSTALMENTS,
debts payable in, effect of judgment, 85, 86.
INSUFFICIENCY,
dismissal of bill in chancery for, 53, 58, 61.
judgment on demurrer to declaration for, 53.
INSURANCE,
acknowledgment of receipt of premium, 471, note, 473.
adjustment of loss by insurance company, 649.
waiver of defects in proof of loss, 662.
waiver of terms of payment, 660–665.
discontinuance of agency, 663.
INTENTION,
in equitable estoppel, 628–637.
general rule concerning, 629.
may be actual or presumable, 629–635.
See CONDUCT, ESTOPPEL BY.
INTERLOCUTORY ORDERS,
effect of, 60, note.

INVENTORY,
amendment of, by administrator, 555, note.
inducing administrator to proceed to, 645, note.

JEOPARDY,
twice in, 88, 89.
JOINT CONTRACT,
judgment upon, merges the same, 104.
JOINT JUDGMENT,
suit by one to restrain, 111.
JOINT TORT,
effect of judgment on, 112.
JUDGMENTS, FOREIGN, IN PERSONAM,
cases considered historically concerning judgments of foreign nations, 256–262.
finally settled in England that such judgments are conclusive on the merits, 261.
immaterial that they are erroneous, 261.
or that they proceed on an incorrect view of the law of England, 262.
unsettled state of cases in this country, 264.
early English dicta formerly followed, 264.
question considered, 264.
judgments of the sister states of America, 266.
history, provisions of Confederation and Constitution, 267.
conclusive on merits, 268.
Mills *v.* Duryee, 268.
nil debet not a good plea, 268–270.
judgments of superior courts record evidence, 269.
Statute of Limitations a good plea when, 271.
whether constitutional provision includes criminal cases, 273.
does not embrace qui tam actions, 273.
does not embrace matters subsequent to the judgment, 274.
judgment of sister state for plaintiff establishes his right to sue in the same capacity, 276.
judgment for a party conclusive of his existence, 276, note.
non-production of evidence, 276.
independent demands, 276, 277.
effect of judgment against executor in regard to assets, 279.
cases of principal and surety, 279.
judgment conclusive of law applied, 279.
error of fact cannot be alleged, 280.
so of irregularity, 280.
unconstitutional laws concerning foreign judgments, 281, 282.
effect of judgment in insolvency, 283.
judgment must have gone on the merits, 284.
matters collateral and incidental, 285.

JUDGMENTS, FOREIGN, IN PERSONAM, — *continued.*
judgment must have been final and conclusive where rendered, 285.
rule of conclusiveness prevails also in chancery, 285.
Federal courts not foreign to state courts, 286.
result of cases stated, 287.
limitation of rule, 287.
judgments of foreign countries liable to impeachment in respect to jurisdiction, 288.
limitation of rule, 289, 290.
not record evidence, 290.
doctrine in respect to impeaching the jurisdiction of courts of sister states, 290–296.
state statutes providing for judgment without personal service have no extra-territorial effect, 296, 299, 301.
cases of foreign attachment, 300.
citizens of the state bound, 301.
also property of non-residents, 301.
whether judgments of sister states may be impeached or restrained for fraud, 302–307.
whether judgments of foreign countries may be, 307.
judgment of foreign country no merger of cause of action, 308.
otherwise of judgments of sister states, 310–314.
garnishment or trustee process, 314–317.
doctrine of privity, 317.
no privity between executors or administrators of different states, 317.
executor in one state and administrator de bonis non in another state, 318.
judgments of foreign courts of inferior jurisdiction, 319–325.
whether constitutional provision embraces such judgments, 319–323.
question considered, 323.
foreign consular courts, 324.
impeaching jurisdiction of such courts, 325.
JUDGMENTS, FOREIGN, IN REM,
deemed conclusive a century ago, 236.
Algerine decrees, 238.
conclusive of the fact for which the condemnation was pronounced, 241.
otherwise in New York, 241.
immaterial that judgment was palpably erroneous, 242.
decrees concerning marriage and divorce, 243.
decrees of Probate Court, 245.
sales of wreck and derelict, 246.
conclusive only of matters essential to the decision, 247.
limitation of doctrine, 248.
not conclusive of matters obscurely or ambiguously stated, 249.
whether evidence admissible to show what was meant, 250.
jurisdiction may be questioned, 250.
adjudication of jurisdiction, 252.

JUDGMENTS, FOREIGN, IN REM, — *continued.*
presumption of authority, 253.
want of authority of tribunal to sit as court, 253.
may be impeached for fraud, 254.
JUDGMENTS IN PERSONAM,
distinguished from judgments in rem, 43, 48, note.
general operation of, 48.
judgment conclusive of necessary inferences, grounds, and findings, when, 48, 152, 158, 223, 231, 232, note, 241, 247, 249.
plea of former judgment, 80–90.
See FORMER JUDGMENT.
there must be an identity between the causes of action, 80.
judgment on plea of non est factum in suit on a bond no bar to special promise to pay the bond, 81.
judgment that suit has been prematurely brought on a note no estoppel to sue on the consideration of the note, 81.
other examples of the rule concerning identity, 82.
plea of judgment in an action for failing to remove a wreck, 82.
plea of judgment for defendant in an action of contract as bar to suit for fraudulent representation concerning the contract, 83.
plea of judgment for defendant in an action for false representation of soundness as bar to an action on warranty, 83.
action for goods sold defeated by special promise, and subsequent suit on the special promise, 83.
test of identity, 84.
cases of recurring liability, 85.
tax assessments and debts due by instalment, 85, 86.
form of action different, 86.
evidence to supply omission in the record, 87.
twice in jeopardy, 88, 89.
plea of former verdict, 90–103.
operates as estoppel, though cause of action be different, 90.
but the particular point in dispute must be the same in both cases, 90.
nature of the plea, 91.
sentence of spiritual court against a marriage in suit for jactitation no estoppel to an indictment for bigamy, 92.
recovery in trespass, effect of, 93, 94.
other cases, 95–97.
judgment for defendant on one of two notes by reason of defence common to both, 95, 96.
plea of fraudulent alteration of note and reply of judgment obtained on the note, 96, 97.
suit upon a special contract pleaded by opposite party in a former action and there denied by plaintiff, 97.
judgment in ejectment conclusive of right to mesne profits, 97.
in trespass quare clausum, 98.
result of the cases stated, 99.
verdicts out of equity, 101.

JUDGMENTS IN PERSONAM, — *continued.*
judgment against several parties, rights inter sese, 101, 102.
when suit to enforce judgment opens it, 102, 103.
effect and operation of judgment and verdict estoppels, 103.
merger, 103–111.
joint contractors, 104–110.
partners, 107.
other special cases, 108–111.
parties to bills and notes, 111.
joint and several bonds, 111.
tortfeasors, 112.
parties, 113–142.
See PARTIES AND PRIVIES.
judgments in personam bind only parties and privies, 113, 114.
who are parties, 114.
parties under legal disability, 116–118.
married women, 116, 117.
infants, 117, 118.
lunatics, 119.
judgments against persons deceased, 119.
principal and agent, master and servant, 120–127.
master of vessel and owner, 121.
officer and deputy, 121, 122.
principal and surety, 123, 124.
bailor and bailee, 126, 127.
judgment in ejectment, 128, 129.
parties nominally the same, but really different, 130.
judgment concludes parties only in the character in which they appear, 130, 131.
effect of notice to third persons liable over, 131–134.
in some cases liable to indemnify without notice, 134.
whether one appearing as a witness is estopped, 135, 136.
trustee and cestui que trust, 136, 137.
effect of judgment against a corporation in suit against stockholder, 137.
garnishment or trustee process, 138–142.
judgment without satisfaction, 138, 139.
custom of London, 138, 139.
judgment must be fairly obtained, 141.
all defences must be made, 141.
privies, 142–149.
definition, 142.
judgments conclude privies as well as parties, 142.
illustrations, 143–145.
no privity between guarantor and principal, surety and principal, and co-sureties, 145, 146.
no privity between administrator or executor and heir or devisee, 146, 147.
executor of executor, 148.

JUDGMENTS IN PERSONAM, — *continued*.
whether administrator de bonis non may maintain scire facias on a judgment of his predecessor, 148, note.
administrator in privity with intestate, 148.
executor in privity with testator, 148.
heir or devisee in privity with ancestor or devisor, 148.
whether administrator de bonis non in privity with his predecessor, 148.
no privity between executors or administrators of different states, 149.
purchaser of a judgment, 149.
claimants who are not privies, 150–152.
cases in which judgments avail against third persons, 150–152.
relation of debtor and creditor, 150, 151.
judgments no estoppel as to matters incidentally determined, 152.
matters which might have been litigated, 152, 153.
effect of judgments as to matters not passed upon, which might have been put in issue, 153.
various examples, 154–157.
distinction between courts of concurrent and those of exclusive jurisdiction as to matters incidentally determined, 157.
what is to be regarded the point in issue, 158.
submission of 'all matters in difference' to reference, 166.
evidence withheld as to one count of declaration, 166.
submission of 'all demands between the parties,' 166.
action on two notes and withdrawal of one, 168.
distinct trespasses, 169.
continuing damages, 171, 172.
suit for interest after judgment for principal, 170.
independent cause of action may be drawn into the pleadings and decided upon, 174.
judgment on contract and cross-action for negligence, or breach of warranty or fraud, 174–187.
rule in New York, 175.
rule in Massachusetts, 177.
rule in New Hampshire, 177.
rule in Ohio, 178.
rule in England, 179.
rule in Michigan, 183.
question considered, 185.
nature of cross-rights, 186.
distinction between case where evidence is omitted and where insufficient evidence is produced, 187.
evidence as to one count rejected as inadmissible, and subsequent suit on same count, 189.
action to recover money paid under judgment, 190.
effect of judgment upon one of several cumulative remedies, 191, 192.
effect of judgment upon portion of an entire demand, 194.
single cause of action not to be split, 197.

JUDGMENTS IN PERSONAM, — *continued.*
concealment of part of cause of action, 197.
what constitutes an entire demand, 197.
judgment for plaintiff by default, plaintiff allowing defendant partial credit for separate demand, 199.
entries made of record after judgment, 199.
form of action not material, 200.
judgment against plaintiff estops him to allege same demand as set-off, 201.
immaterial that former judgment averred other demands besides the present claim, 201.
judgment at law bars suit in chancery, 201.
collateral impeachment of judgments, 202.
as to jurisdiction of superior courts, 203.
presumption as to, 204.
parties under disability, 204.
courts not proceeding according to common law, 204.
inferior courts, 205.
adjudication as to jurisdiction, 205–207.
denial of attorney's authority to appear, 208.
fraud in case of superior courts, 209–217.
English doctrine, 209–216.
probate decrees, 211.
American cases concerning fraud in conflict, 214–216.
question considered, 217.
distinction between judgment obtained by fraudulent practice and judgment on fraudulent claim, 218–220.
JUDGMENTS IN REM,
general nature and effect of, 42–49.
distinguished from judgments in personam, 43, 48, note, 223.
adjudications of prize in admiralty, 221.
conclusive upon all persons, not only of the change of property, but also of the fact for which condemnation was pronounced, 221.
cases of collision, 222.
condemnation of goods in the Exchequer, 224–226.
acquittal of goods, 226.
effect of decree establishing pedigree, 227.
decree as to legitimacy, 227.
proceedings in marriage and divorce, 227–229.
decrees of probate, 229–232.
orders of removal of paupers, 232.
decree appointing a tutor to a minor, 233.
judgment confirming report of commissioners of boundary, 233.
judgments in attachment, replevin, and the like, 234.
judgments incidentally establishing reputation, custom, public ferries, etc., 234.
nature of judgment in rem, 234.
whether unsatisfied judgment against a vessel a bar to a suit in personam, 235.

JURISDICTION,
recitals of, 36, 296.
what constitutes, 51, 52.
not acquired by acquiescence or request, 51, note.
courts must have, 61.
impeachment of jurisdiction of superior courts, 203.
presumptions as to jurisdiction, 204.
superior courts not proceeding according to course of the common law, 204.
English Admiralty an inferior court, 205.
otherwise of Federal courts of United States, 205, 206.
adjudication of jurisdiction, 205–207, 252.
appearance by attorney, 208.
of foreign courts, 250–252, 288–290.
of judgments of sister states, 290–302.
See JUDGMENTS.

JUS TERTII,
when bailee may set up, 548–552.
See BAILOR AND BAILEE.

KNOWLEDGE OF FACTS,
the rule concerning, in equitable estoppels, 611.
where party has means of informing himself, 611.
forgetfulness of facts, 615.
in cases of boundary, 618.
conflict of cases, 619, 620.
long acquiescence held sufficient in some states, 620.
limits of the estoppel in these cases, 621.
warehouse receipts given under mistake, 622.
ignorance the result of gross negligence, 626, note.
party must know that representation will be acted on, 629, 636.
purport of inquiry not understood, 636.

LAND COMMISSIONERS,
decisions of, 67.

LANDLORD AND TENANT,
estoppel of tenant to deny landlord's title, 506.
of modern origin, 506.
nature of, in time of Coke, 506.
arose only in case of deed, and against the party sealing, 506.
and only when the demise was the gist of the action, 507.
seal not the foundation of the modern estoppel, 506.
estoppel continues as long as tenant continues in possession, 507.
estoppel applies to leases of personalty, 507.
estoppel of the old common law different from that which now prevails, 507.
modern doctrine arose out of assumpsit for use and occupation, 509.

LANDLORD AND TENANT, — *continued.*
enjoyment by permission the foundation of the estoppel, 509.
several cases criticised, 510.
payment of rent evidence of tenancy, 511.
doctrine of mutuality prevails, 512.
same rules prevail concerning competency of parties as in estoppel by deed, 512.
persons under disability not estopped, 512.
doctrine of privity prevails, 512, 513.
sub-lessees, 513.
outstanding title cannot be set up by tenant, 514.
not estopped in cases of fraud, 515.
tenant may show that landlord's title has expired, 517.
new taking or letting into possession, 518, note.
tenant may purchase landlord's estate, and thus end the estoppel, 519.
buying tax title, 519.
acquisition by tenant of title under which landlord claims, 519, 520.
eviction of tenant may be shown, 520.
constructive eviction enough, 522.
ouster in pais, what tenant must prove, 522, note.
tenant not estopped in cases of mistake, 523.
tenant not estopped to explain circumstances under which an attornment has been made, 523.
whether tenant taking lease of land of which he was already in possession is estopped without surrender, 525.
no estoppel in case of mistake, fraud, or misrepresentation, 527.
California doctrine, 527.
rule in New York and Kentucky, 527.
rule in England, 529.
rule in Massachusetts, 533.
question considered, 533.
effect of disclaimer, 534.
lessor may at once eject tenant, but if he do not within the period of limitation, tenant may then set up his own title, 534.
but not before period of limitation has expired, 534.
tenant may show that one to whom he has attorned has no derivative title, 536.
when tenancy is established, the estoppel of tenant arises though tenancy be created by deed showing that landlord had no legal estate, 538.
limitations of rule, 540.
doctrine of tenant's estoppel not confined to cases of ejectment, 541.
doctrine prevails against one in possession under mere license, 542.
tenancy created by law, 542.
widow continuing in possession of husband's estate, 542.
tenant by the curtesy, 542.
relation of mortgagor and mortgagee, 544.
relation of trustee and cestui que trust, 545.

LANDLORD AND TENANT, — *continued.*
position of purchaser of land before payment, 545.
entry under contract of purchase, 545–547.
LAND PATENTS,
when binding, 67.
survey and patent of land commissioners, 67.
LAW,
estoppel to deny constitutionality of, 81, 86, 530, 689.
effect of decisions on the law, 100.
mistake or error of, no ground for impeaching judgments, 83, 84, 209, 210, 261.
estoppel as to statement of, 375, 572.
LEASE,
where no interest passes an estoppel arises, 390.
where an interest passes no estoppel arises, 391.
See LANDLORD AND TENANT; TITLE BY ESTOPPEL.
LEASE AND RELEASE, DEEDS OF,
operation of, by way of estoppel, 423.
LEGITIMACY,
judgment of, as to other children of the same marriage, 44, 227.
LIBEL,
repetitions offered in evidence, 172.
LICENSE,
possession of premises under, works an estoppel, 542.
to use another's land, 665.
LICENSEE OF PATENT,
not permitted to deny validity of patent when, 552, 553.
LIMITATIONS.
See STATUTE.
LIS PENDENS, 115.
LUNATICS,
judgments against, 119.

MARINE INSURANCE,
acknowledgment of receipt of premium, 478.
MARRIAGE AND DIVORCE,
sentence of Spiritual Court in suit for jactitation of marriage, Duchess of Kingston's Case, 92.
proceedings are in rem, conclusive against all persons, 227–229, 243.
foreign decrees, 243.
MARRIED WOMEN,
judgments against, 116, 117.
separate estate, 339.
not estopped by deed at common law, 339, 340.
contra in some states, 340.
joining with husband in deed of her estate, 448, note.

MARRIED WOMEN, — *continued.*
warranty of capacity to draw or indorse bill, 496.
whether subject to estoppel in pais, 599.
conflict of cases, 599–605.
election by, may bind, 675.
MASTER AND OWNER OF VESSEL,
nature of the relation, 121.
MASTER AND SERVANT,
judgment against servant, 120, 121.
judgment in favor of servant defendant, 122.
judgment for or against master, 125.
MERGER,
judgment works, 103.
effect of judgment on joint contract, 104.
partnership cases, 107, 108.
effect of judgment on joint tort, 112.
recurring damages, 171, 172.
doctrine of, as to judgments of foreign countries, 308–313.
as to judgments of sister states, 310.
MERITS,
when judgment rendered on, 53.
See JUDGMENTS.
MESNE PROFITS,
judgment in ejectment conclusive of right to, 97.
MILITARY COURTS,
conclusiveness of judgments of, 65.
MISREPRESENTATIONS,
nature of estoppel arising from, 556–570.
fraudulent and negligent, work estoppel, 610.
the scienter, 610.
as to boundaries cases in conflict, 619, 620.
See EQUITABLE ESTOPPEL.
MISTAKE,
of law no ground of impeaching judgments, 100, 208, 242, 261.
of foreign law, 261.
may be shown in cases of tenancy, 523.
See KNOWLEDGE OF FACTS.
MOLLOY,
on Algiers, Tunis, and Tripoli, 239, note.
MORTGAGE,
buying land subject to, estops purchaser to dispute validity of, 334, note.
grantee in warranty deed reconveying in, not estopped to set up outstanding title and eviction, 359.
nor to claim an after-acquired title, when, 411–413.
of goods to be acquired, 447, note.
MORTGAGOR AND MORTGAGEE,
when mortgagor in possession may dispute title of mortgagee, 544.

MUNICIPAL CORPORATION,
when estopped to set up illegality of bonds, 376, 468, 469.
not estopped to claim property belonging to it improperly sold for taxes, 691.
MUTUALITY, 113–115, 334, 512, 652.
See PARTIES AND PRIVIES.

NEGLIGENCE,
judgment on contract followed by action for negligence in performance thereof, 174–187.
in drawing bill or check, 494, 654, 657.
when estoppel produced by, 494, 612, 631, 653–659.
must be proximate cause of loss, 656.
NEGLIGENT PERFORMANCE OF SERVICES,
action for, after judgment for the services, 174–187.
NEGOTIABLE PAPER.
See BILLS AND NOTES.
NEUTRALITY,
adjudication concerning, 240.
'NIL HABUIT IN TENEMENTIS,'
when allowed between landlord and tenant under the old law, 507.
modern doctrine, 509.
NON-PROS,
effect of entry of, 54.
NON-RESIDENTS.
See JURISDICTION.
NONSUIT,
effect of, 55.
on agreed facts, 56.
NOTES.
See BILLS AND NOTES.
NOTICE,
effect of, upon persons liable over, 131–134.
having means of, 611.
directors of corporations, 611.
NUISANCE,
continuing, 172, note, 705.

ODIOUSNESS,
of estoppels, 5.
OFFICER AND DEPUTY,
judgment for or against deputy, 121, 122.
OFFICER'S RETURN,
when conclusive, 642.
OPINION,
representations of, 572.

OUSTER,
how tenant may show, 522, note.
OUTSTANDING TITLE,
may not be set up by tenant when, 514.
See LANDLORD AND TENANT.
OWNER OF VESSEL,
relation to master, 121.

PAIS, ESTOPPEL IN,
defined, 3, 453.
in the old common law, 453.
division of subject, 455.
changes in and growth of the doctrine, 456.
See AGENCY; BILLS AND NOTES; CONDUCT, ESTOPPEL BY; CORPORATIONS; ELECTION; ESTOPPEL; LANDLORD AND TENANT; PARTNERSHIP.
PARTIES AND PRIVIES,
adversary parties required by rule of res judicata, 101.
judgment against one of several joint contractors a bar to an action against the rest, 104–110.
rule as to joint and several contracts different, 105, note.
rule concerning joint contractors as declared in Sheehy *v.* Mandeville denied, 107, note.
Sheehy *v.* Mandeville explained, 107, note.
judgment against one of several partners, 107.
parties to bills and notes, 111.
English rule concerning judgment against one of several joint tort-feasors, 112.
contrary rule in America, 112.
parties in estoppel by matter of record, 113–142.
judgments in personam bind only parties and privies, 113, 114.
examples, 115.
what term 'parties' means, 114.
parties must be openly such, 115.
purchasers pendente lite, 115.
judgments against parties under legal disability, 116–118.
rule in Maryland concerning married women, 116.
in Massachusetts, 116, 117.
in Indiana, 117.
in Pennsylvania, 117.
judgments against infants, 117.
day given them by statute after majority, 117.
cases not arising on the statute, 117, 118.
rule in Kentucky, Indiana, and North Carolina, 118.
rule in Illinois, 118.
consideration of the question, 118.
judgments against lunatics binding when, 119.

PARTIES AND PRIVIES, — *continued.*
judgments against deceased persons, 119.
not always fatal that parties more or less numerous in former action than in the present, 119.
principal and agent, master and servant, 120–127.
officer and deputy, 121, 122.
master and owner of vessel, 121.
principal and surety, 123, 124.
bailor and bailee, 126, 127.
judgments in ejectment, 128, 129.
parties nominally the same, but really different, 130.
judgments conclude parties only in the character in which they appear, 130, 131.
apparent exceptions to this rule, 131.
effect of notice to persons liable over, 131–134.
in some cases liable to indemnify, bound without notice, 134.
whether one appearing as witness is estopped, 135, 136.
trustee and cestui que trust, 136, 137.
numerous beneficiaries, 136, 137.
limit of rule, 137.
relation of stockholder and corporation, 137.
garnishment or trustee process, 138–142.
See GARNISHMENT.
privies, 142–149.
definition, 142.
judgment concludes privies as well as parties, 142.
illustrations, 143–145.
no privity between guarantor and principal, surety and principal, and co-sureties, 145, 146.
no privity between administrator or an heir or devisee, 146, 147.
administrator in privity with intestate, 148.
executor in privity with testator, 148.
executor of executor, 148.
heir or devisee in privity with ancestor or devisor, 148.
whether administrator de bonis non in privity with his predecessor, 148.
situation of administrator de bonis non historically considered, 148.
whether he may maintain scire facias on a judgment of his predecessor, 148, note.
no privity between executors or administrators of different states, 149.
purchaser of a judgment, 149.
claimants who are not privies, 150–152.
where personal judgments bind strangers, 150–152.
chain of title under judgment and sale, 150.
relationship established, 150.
in estoppel by deed, 334–348.
stranger cannot take advantage of estoppel, 334.
persons acting under authority of grantee by deed not strangers, 336.

PARTIES AND PRIVIES, — *continued.*
party not estopped by a deed under which he does not claim, 336.
parties only estopped in the character in which they execute deed, 337.
deed of guardian, 338.
parties must be sui juris, 339.
estoppel against the state, 341.
effect of accepting deed without relinquishment of dower, 344.
doctrine of privity illustrated and examined, 345.
parties in estoppel in pais, 512.
landlord and tenant, 512.
doctrine of mutuality prevails, 512, 597.
competency of parties, 512.
doctrine of privity prevails, 512, 513.
estoppel by conduct, 597.
admissions of one of several executors or administrators, 599.
whether married women may be estopped by conduct, 599.
See MARRIED WOMEN.
whether infants may be, 605.
See INFANTS.
doctrine of privity prevails in cases of estoppel by conduct, 607, 608.
rule of mutuality does not apply to estoppel by misrepresentation, 652.
PARTITION,
effect of judgment in, 79.
implied warranty in deed of, 409.
PARTNERSHIP,
judgment against one of several partners, 107.
holding one out as partner, 564, 565, note.
PATENTS,
decisions of commissioner of, conclusive, 67.
land patents, 67.
recitals in, 372.
licensee or assignee of, when estopped to deny patentee's right to profits, 552, 553.
PATENTS, LAND,
when binding, 67.
survey and patent of land commissioners, 67.
PAUPERS,
effect of orders concerning, 45, 232.
PAYMENT,
of rent evidence of tenancy, 511.
or that tenant is assignee of lease, 511, note.
PEDIGREE,
decree concerning, conclusive upon all persons, 45, 227.
PENDENTE LITE,
situation of purchasers, 115.
perjury, 217.

PERSONAL PROPERTY,
title by estoppel concerning, 446.
PLEADING, PRACTICE, AND EVIDENCE,
sworn pleadings, 571, note.
pleading the estoppel, 697–701.
whether estoppel by record or by deed must be pleaded, 697.
where there is no opportunity to plead, matter of estoppel conclusive in evidence, 698, note.
estoppel in pais need not be pleaded at common law, 699.
effect of statutes upon the subject, 699.
estoppel by record, 701–707.
nul tiel record the proper general issue in suit upon judgment of court of record, 701.
so of judgments of sister states, 701.
otherwise of judgments of foreign countries, 701.
replication to denial of record in the same court, 701.
of record of another court, 701.
burden of proof, 701, 702.
practice as to setting out judgment in suit upon the same, 702.
in pleading or replying judgment, 702.
examples, 702, 703.
parol evidence admissible to show or disprove identity of matter in litigation, 703.
plea of judgment in foreign country, 705.
in sister state, 705.
practice in declaring for a continuing nuisance, 705.
estoppel shown against one's own pleading, 706.
immaterial whether judgment rendered before or after action, 706.
estoppel by deed, 707, 708.
when demurrer may be entered, 707.
replication where declaration does not show the matter of estoppel, 707.
pleading respecting leases, 708.
estoppel in pais, 709–717.
proof requisite to estoppel by conduct, 709.
allegation of assent to sale, 711.
estoppel in pais against a deed, 712.
may be ground for filing bill for conveyance, 712.
whether the estoppel is available at law in respect to land, 712.
conflict of authority, 712.
question considered, 715.
injunction against proceedings at law, 716.
inconsistent positions in court, 717–723.
amendment granted on terms, 717.
waiving provisions of law, 717.
other cases, 718.
admissions of fact, 719, 720.
admissions in pleading, 720.
rejecting competent evidence, 720.

PLEADING, PRACTICE, AND EVIDENCE, — *continued.*
refusal to produce document on notice, 720.
inferences from position taken in court, 721.
committing fault in pleading which has been followed, 721.
principle of the rule concerning inconsistency, 722.
when rule not applied, 722.
POSSESSION,
effect of tenant being in possession at time of taking lease, 527–534.
under will, 554, 555.
notice by, 595.
POWERS OF APPOINTMENT,
election arising under exercise of, 678.
PRECEDENTS IN PLEADING,
commencement and conclusion of plea of matter of estoppel, 724.
replication by way of estoppel to plea, 724.
plea by matter of estoppel that the plaintiff brought an action against the defendant for the same cause, and that defendant had judgment, 725.
former judgment with appeal and continuance, and appeal dismissed, 726.
former judgment and appeal, and appeal not entered, and judgment affirmed, 726.
replication of nul tiel record, 726.
rejoinder, 727.
replication with new assignment of other promises, 727.
rejoinder, 728.
former recovery in an action by executor against lessee, 728.
plea of estoppel by verdict of a particular matter adjudicated in a different cause of action, 729.
replication by way of estoppel to plea of set-off of judgment in inferior court upon the same matter, 732.
plea of same, 733, note.
replication to plea traversing plaintiff's title to land, an estoppel by judgment in ejectment, 733.
plea of judgment recovered by plaintiff in superior court for same cause of action, 734.
pleas in debt and scire facias on judgments, by executor, nul tiel record, and joint judgment, one of defendants being still alive, 735.
plea of judgment for defendant pro eadem causa, rendered in a foreign court, 735–738.
estoppel by deed, replication in trespass quare clausum (to a plea justifying the entry under a stranger as owner) of a demise from the defendant, 738.
estoppel in pais, replication to a plea of the incompetency of the payee of a bill to indorse the same, 739–741.
PREMATURE ACTION,
judgment by reason of, 53, 56, note.

PRESUMPTIONS OF JURISDICTION,
when conclusive, 204.
when prima facie, 204.
PRINCIPAL AND AGENT,
judgment against principal, 120–127.
effect of suit by agent in his own name in right of principal, 124.
judgment against principal bars suit against agent when, 125.
ratification by principal only an element of estoppel, 457, 694.
liability of principal not based on estoppel, 457, 566.
holding one out as agent, 564, 565, note.
representations of agents, 566, 598.
assuming to act as principal, 687.
agents of corporations, 598.
state officers, 598, note.
PRINCIPAL AND SURETY,
judgment for or against either in contest with another, 123, 145, 146, 150, note, 279.
surety estopped to deny existence of principal, 373.
PRIVITY,
in case of judgments, 142–149.
doctrine of, in estoppel by deed examined, 345, 347, 356.
defined, 347.
in law, 347, note.
in case of estoppel in pais, 512, 607, 608.
See PARTIES AND PRIVIES.
PRIZE,
adjudication of, 45, 221, 238, 248.
PROBATE, DECREES OF,
conclusive upon all persons, how far, 43, 211, 229–232.
foreign decrees, 245.
PROCEDURE.
See PLEADING, PRACTICE, AND EVIDENCE.
PROXIMATE CAUSE,
negligence must be, to create estoppel, 656.
PUBLIC FERRY,
judgment incidentally establishing, 234.
PURCHASE, CONTRACT OF,
possession obtained by, 545–547.

QUIET ENJOYMENT, COVENANT FOR,
works estoppel, 407.
QUI TAM ACTIONS,
of sister states not intended by Constitution, 273.
QUITCLAIM, DEEDS OF,
warranty in, 400.
rule in Massachusetts and other states, 402, 403.
rule in still other states, 403, 404.
See TITLE BY ESTOPPEL.

RATIFICATION,
only an element of estoppel, 457, 694.
REAL ACTIONS,
use of this term in English law, 45.
REAL PROPERTY,
title by estoppel, 384–446.
See TITLE BY ESTOPPEL.
whether an estoppel in pais as to, available at law, 712.
REBUTTER,
meaning of, 388.
title by estoppel may arise without, 445.
See TITLE BY ESTOPPEL.
RECEIPT,
in instrument not under seal not conclusive generally, 471.
exceptions, 473.
acknowledgment in policies of marine insurance, 473.
where acknowledgment has been acted on by third person, 473.
warehouse receipts, 474.
bills of lading, 475.
receipt given an attaching officer, 476.
in a deed not conclusive, 476.
RECITALS,
of jurisdiction, 36.
not under seal, 331, note.
of boundaries, 334, note.
defined, 365.
in deeds, 365–383.
particular recitals work estoppel, 365–376.
illustrations, 365–368.
land bounded on street, 370.
land sold subject to mortgage, 371.
recitals in patents, 372.
sureties in bonds, 373.
recital of law, 375.
deed confirming a former deed in which were recitals, 375, 376.
in municipal bonds, 376, 468, 469.
general recitals do not work estoppel, 377–383.
qualification of rule, 380.
recital of immaterial facts, 382.
date of deed, 382.
acknowledgment of receipt in a deed, 383.
RECORD,
defined, 35.
its effect, 35.
whom it binds, 35.
recitals of jurisdiction, 36.
clerk of court may bind himself by the record, 36, note.
early meaning of term, 37.

RECORD, — *continued.*
may be corrected how, 37.
docket entries, 38.
foreign judgment not debt of, 309.
See JUDGMENTS; RES JUDICATA.
RECOVERY, COMMON,
operation of, 418.
RECURRING DAMAGE, 171, 172.
REGISTRATION OF STOCK,
when conclusive evidence of membership of corporation, 563.
REGISTRY LAWS,
effect of, in questions of title by estoppel, 441.
RELEASE, DEEDS OF,
operation of, by way of estoppel, 423.
REMITTENT TORT, 198.
RENT, PAYMENT OF,
evidence of tenancy, 511.
also of assignment of lease, 511, note.
REPLEVIN,
not a proceeding in rem, 50, note.
REPRESENTATIONS,
defined, 556, 570.
estoppel by misrepresentation, 556–570.
need not be express, 570.
must concern facts, 572.
must refer to present or past facts, 574.
exception, 577.
must be plain, 578.
such as might well be acted on, 582.
knowledge of facts, 609–626.
fraudulent and negligent misrepresentations work estoppel, 610, 612.
intention, 628–638.
must have been acted on, 638–652.
negligence, 653–659.
See CONDUCT, ESTOPPEL BY.
REPUTATION,
judgments incidentally establishing, 234.
RESIDENTS,
judgments touching residents who are not citizens, 297.
RES JUDICATA,
meaning of the term, 39.
general principle of, 39.
effect of, under Roman system, 40.
decree in the judicium legitimum, 40.
in the judicium imperio continens, 41.
doctrine depends for its effect upon the nature of the proceeding, whether in personam or in rem, 42.

RES JUDICATA, — *continued.*
terms 'in rem' and 'in personam' in the Roman law, 42, 43.
in the English law, 44.
use of terms 'in rem' and 'in personam' by Bracton, 44.
by Coke, 44.
judgment in rem is a proceeding in respect to status, 46.
special significance of term 'in rem' at the present time, 45.
judgment in rem binds all the world, 45.
literal import of the term 'in rem,' 45.
proceedings in attachment not properly proceedings in rem, 49.
otherwise of an order of sale of perishable goods, 50.
proceedings in replevin, 50, note, 234.
verdict must be followed by judgment, 51.
must have been valid and subsisting, 51.
voidable judgments, 51, 52.
must have been on merits, 52.
judgment on preliminary point, 53.
insufficiency of declaration, 53.
dismissal of bill in chancery for insufficiency, 53.
judgment on demurrer, 53, 54, 58.
dismissal of bill in equity, 53, 58, 61.
when decree is on merits, 53.
non-pros, 54.
nonsuit, 55.
dismissal of cause, 56.
nonsuit on agreed facts, 56.
judgment on retraxit, 56.
premature suit, 56, note.
abatement of writ, 56, note.
dismissal for want of jurisdiction, 56, note.
decree that plaintiff had no title and subsequent acquisition of title, 56, note.
dismissal for want of equity does not bar suit at law, 59.
judgment must have been final, 59.
interlocutory orders, 60, note.
judgment must be certain, 61.
judgment must have been rendered by a legally constituted court, 61.
illustrations, 61–63.
jurisdiction, 61.
judgment by divided court, 63.
college orders, 64.
ecclesiastical decrees in this country, 65.
courts-martial, 65.
judgment of courts of inferior jurisdiction, 66.
decisions of comptroller of currency, 66.
of commissioners of patents, 67.
of board of land commissioners, 67.
award of arbitrators, 68.
of statutory appraisers, 69.

RES JUDICATA, — *continued.*
judgment of court of last resort, 71.
agreed judgments, 72.
English rule, 73.
stay of execution, 73, note.
judgment by confession, 73.
judgment by default, 75.
English rule, 75.
conflict of authority in this country, 76, 77.
judgment by default against executor or administrator, 78.
final judgment by default, 78.
proceedings supplementary to judgment, 79.
adversary parties necessary, 101.
See JUDGMENTS.

RETRAXIT,
effect of judgment on, 56.

RETURN OF SHERIFF,
when an estoppel, 642.

REVENUE CASES,
judgment in, 46, 224, 225.

ROMAN LAW,
doctrine of res judicata in, 40.

SCIENTER.
See KNOWLEDGE OF FACTS.

SCIRE FACIAS,
whether administrator de bonis non may maintain, on judgment of his predecessor, 148, note.

SEAL,
the foundation of estoppel by deed formerly, 330.
history of seals, 330, 331.
only great men used them at first, 330.
hence their significance, 330.
change of doctrine concerning seals, 331.
contract as the ground of the estoppel, 331, 332.

SEPARATE ESTATE OF WIFE,
may be bound by her through estoppel, 339.

SERVANT,
judgment against, effect on master, 120, 121.

SERVICE OF PROCESS.
See JURISDICTION.

SET-OFF,
judgment upon plea of, conclusive, 174, 201.

SETTLEMENT CASES,
judgment in, 45, 232.

SHERIFF,
effect of judgment against deputy, 122.
SHERIFF'S DEED,
ineffectual as an estoppel when, 396.
SHERIFF'S RETURN,
when an estoppel, 642.
SIGNATURE,
adoption of, 491.
SILENCE,
when estoppel in pais created by, 584.
See CONDUCT, ESTOPPEL BY.
SLANDER AND LIBEL,
judgment of acquittal in criminal prosecutions, 115, 116.
repetitions of, offered in evidence, 174.
SPECIAL APPEARANCE,
effect of, in a cause, 290.
SPECIAL JUDGMENTS, 72–79.
SPECIAL TRIBUNALS, 61–72.
SPLITTING ACTION,
continuing damages, 171, 172.
not allowed in ordinary cases, 192.
concealment of part of cause of action, 197.
what constitutes entire demand, 197.
'STANDING BY,'
effect of, 585, 671.
See CONDUCT, ESTOPPEL BY.
STARE DECISIS,
not an estoppel, 101.
STATE,
whether bound by estoppel, 341, 598, note.
STATUS,
judgment of, 46.
STATUTE,
of Limitations, not a defence on the merits, 53, note.
of Limitations, when a good plea to an action on a foreign judgment, 271.
deed in contravention of a statute, 351.
de Bigamis, 385.
Quia Emptores, 385.
of Gloucester, 387.
of Anne, 388, note.
disclaimer of tenant, 534.
of Uses, law before as to title by estoppel, 428.
since the statute, 428–446.
See TITLE BY ESTOPPEL.
when party estopped to deny constitutionality of, 689.
of Frauds as to estoppels in pais, 665, 666, 712.

STAY OF EXECUTION,
conclusive as a judgment by confession, 73, note.
STOCKHOLDERS,
effect as to, of judgment against corporation, 137.
receiving dividends, 687.
STREETS,
land bounded by, 370.
effect of petitioning for opening, 691.
SUB-LESSEES,
in privity with lessee, 513.
SUPERIOR COURTS,
presumption concerning jurisdiction, 204.
impeaching judgments of, for fraud, 209–217.
SUPERVISORS,
effect of auditing and partly paying improper claim, 693.
SURETY,
judgment against principal not a judgment against surety, 123, 124, 145, 146, 150, note, 279.
effect of judgment against co-surety, 132, note, 145, 146.
not permitted to say that principal was not duly appointed, 373.
SWORN STATEMENTS,
in pleadings, depositions, and the like, 571, note.
SYNODS,
decrees in, 65.

TAX ASSESSMENTS,
former judgment on, 85, 86.
levying tax to pay compensation for laying out street, 691.
levying taxes generally, 692.
TAX TITLE,
tenant cannot buy and set up against landlord, 519.
TENANCY.
See LANDLORD AND TENANT.
TITLE BY ESTOPPEL,
history of the doctrine, 384–390.
proper statement of the rule, 384.
estoppel not a conveyance, 384, note, 385, 413, note.
at common law only four kinds of assurance possessed the efficacy of passing after-acquired interests, 385.
operation of feoffment, 385, 414.
Statutes de Bigamis and Quia Emptores, 385.
the old common-law warranty, 386.
lineal warranty, 386.
collateral warranty, 387.
Statute de Donis, 387.
statute of Gloucester, 387.

TITLE BY ESTOPPEL, — *continued.*
warrantia chartæ, 388.
statute of Anne, 388, note.
warranties and real actions abolished, 388, note.
modern warranty, 389.
rebutter, 388.
leases, 390–394.
where no interest passes, 390.
where an interest passes, 391.
the doctrine explained, 393.
between grantor and grantee, 394–413.
general rule, 394.
sheriff's deed, 396.
title by estoppel without warranty, 396.
under statutes, 398.
title by estoppel in deeds with warranty, 399.
effect of deed depends on nature of grant and warranty, 400.
covenant of warranty limited to estate granted in some states, 402.
rule different in other states, 403.
grants with warranty by trustees, executors, and the like, 404.
rights of way, 404.
partition deed, 404.
effect of mill acts, 405.
extinguishment of covenants, 406.
fraudulent conveyances, 406.
improvements erected by grantor, 407.
covenants for quiet enjoyment, 407.
distinction between covenants of seisin and those for further assurance, 408.
implied warranty in partition of land, 409.
grantee before and grantee after title acquired, 413–446.
statutes as to this subject, 413, note.
estoppel at common law in case of feoffment, 414.
whether the interest passed by reason of the warranty, 415.
operation of the fine, 417.
operation of the common recovery, 418.
operation of lease, 420–423.
explanation of, 421–423.
operation of release, 423.
operation of lease and release, 423.
operation of the grant, 424.
operation of the bargain and sale, 424–428.
origin of, 425.
void at law originally, 425.
effect of a warranty in, 427.
result of consideration of law prior to Statute of Uses, 428.
conveyances under this statute, 428–446.
consideration of bargain and sale, 428–446.
decisions in favor of the estoppel against second grantee, 429–433.

TITLE BY ESTOPPEL, — *continued.*
cases contra, 433–438.
question considered, 438–446.
distinction between cases where grantor had seisin and where he had not, 438.
where grantor had not seisin, 438–443.
such a case not within Statute of Uses, 438.
what necessary to pass title under the statute, 438–440.
warranty never possessed power of conveyance, 440.
nor can it operate as a lien against an innocent purchaser, 441.
effect of registry laws, 441.
no privity between second grantee and his grantor, 441.
cases distinguished, 443.
grantee with seisin, that is as disseisor, 444.
first grantee now acquires an estate under Statute of Uses, 444.
title by estoppel may prevail now without rebutter, 445.
covenants for title, 446.
title by estoppel concerning personalty, 446.
TORT, JOINT,
effect of judgment on, 112.
TORT, REMITTENT,
judgment in cases of, 171, 172.
TRESPASS,
effect of judgment in trespass quare clausum fregit, 98.
TRUST,
beneficiaries under, estopped to impeach, 683.
accepting appointment under, 686.
TRUSTEE,
when he can represent cestui que trust in litigation, 136, 137.
when he may dispute title of cestui que trust, 545.
TRUSTEE PROCESS,
effect of judgment against trustee, 138.
voluntary payment by trustee, 138.
custom of London, 138, 139.
if execution satisfied, trustee discharged pro tanto, 139.
original creditor may prove his claim greater than admitted, 139.
judgment must have been valid, 140, note.
all defences must have been made, 141.
foreign judgments on, 314–317.
TUTOR,
decree appointing tutor to minor, 233.
TWICE IN JEOPARDY,
rules in respect to, 88, 89.

ULTRA VIRES,
when corporations estopped to set up, 466–468.
USE AND OCCUPATION,
ground of tenant's estoppel, 509.

USURY,
one may not be estopped to allege, 566, note.

VALUE,
representations of, 573, 574.
VENDEE,
estoppel of, in equity while purchase-money remains unpaid, 545–547.
holds relation of duty in such case like that of tenant, 547.
VERDICT,
must be followed by judgment, 51.
estoppel by, 90–103.
verdicts out of equity, 101.
See FORMER VERDICT.

WAIVER,
distinguished from estoppel by misrepresentation, 660.
of defects in proofs of loss in insurance, 662.
of payment of premium or other terms of contract, 663.
discontinuance of agency, 663.
whether waiving one term of contract waives more, 663.
permitting outlay on one's premises, 665.
what necessary to make a waiver, 671.
of provisions of law, 717.
WAREHOUSE RECEIPTS,
when conclusive, 474.
mistake in giving may be shown, 622.
WARRANTIA CHARTÆ, 388.
WARRANTY,
judgment on contract followed by action for breach of warranty therein, 174–187.
under the old common law, 386.
lineal warranty, 386.
collateral warranty, 387.
modern warranty, 389.
limited in some states to extent of grantor's interest, 402.
otherwise in other states, 403.
never possessed power of conveyance, 440.
nor can it operate as a lien against an innocent purchaser, 441.
See TITLE BY ESTOPPEL.
admission of genuineness of signature, 480–495.
of capacity, 495–499.
See BILLS AND NOTES.
WHARFINGER,
possession by, 549.
WIDOW,
acceptance of deed by grantee of husband, 344.
release of dower, 448.

WIDOW, — *continued.*
in possession of husband's real estate estopped to deny title of heir, 542.
and of husband's grantee, 542.
election of, 675, 678.
'WILFULLY,'
term as used in Pickard *v.* Sears explained, 630.
WILL,
probate of, establishes what, 43, 211, 229–231, 245.
possession taken under, 554, 555.
doctrine of election, 673.
WITNESS,
whether estopped by judgment, 135, 136.
may deny his own statements, 135, note.
procuring another to witness one's deed, 571, note.
WITNESSING DEED,
works estoppel, 571.
WORDS,
'all demands,' 166.
'good,' 500.
'all right,' 581, 582.
'wilfully,' 630.
WRECK AND DERELICT,
sales of, conclusive upon all persons, 246.
WRIT OF ENTRY,
effect of judgment in, 98.

University Press: John Wilson & Son, Cambridge.

11
.9